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Criminalizing Nonconsensual Pornography Through Amending and Applying the Federal Cyberstalking Statute 18 U.S.C. §2261A

Rachel Bangser ¹

Abstract

Nonconsensual pornography, more commonly known as “revenge porn,” is a vicious action that creates threatening and harmful situations for its victims. By amending 18 U.S.C. §2261A, the federal stalking and cyberstalking law, many of the ways that nonconsensual pornography is disseminated may fall under the statute, thereby working to effectively criminalize a large number of instances of nonconsensual pornography.

¹ Syracuse University College of Law, Juris Doctor expected 2016. I would like to thank Professor Lauryn Gouldin for her invaluable guidance, support and assistance with this note, and Carrie Goldberg for her counsel and advice.

I: REVENGE PORN 101

A. Introduction

In today's society, there is an increasing dependence upon technology and the Internet. With all aspects of our lives, online connectivity and mobile devices have infiltrated seemingly ordinary tasks – our refrigerators now alert us when we've run out of milk; our phones remind us to walk the dog. This influx of technological reliance has permeated our interpersonal relations and allowed individuals to connect in unprecedented ways. One of the ways that has changed the most during the 21st century is how people view intimacy in the digital age. The introduction of mobile devices and instantaneous online communication has enabled individuals to expand previously defined boundaries of intimacy and sexual behavior. While formerly reserved for magazines stashed under mattresses, pornography, including intimate photographs of one's partner, has entered the mainstream. Due to the relative ease with which one can take an image of his or her genitalia, or a couple can photograph themselves engaged in sexual activity, this amateur pornography has become a common element of many relationships in the 21st century. The effects of this, however, create a situation where, at the dissolution of a relationship, many couples remain in possession of images of their ex-lover that are damaging, illicit, and were taken with the intent of remaining solely in the possession of the individual. When a relationship goes awry and a scorned ex-partner chooses to use those images for purposes outside of the relationship, a situation arises where the images become nonconsensual pornography in the public arena. This nonconsensual pornography is known as "revenge porn."

B. What Is Revenge Porn?

Nonconsensual pornography – frequently referred to by its more common name, “revenge porn” – is a far cry from the sexy, provocative mental images that it conjures upon first blush. Revenge porn is defined as “a form of sexual abuse that involves the distribution of nude/sexually explicit photos and/or videos of an individual without their consent. Revenge porn, sometimes called cyber-rape or nonconsensual pornography, is usually posted by a scorned ex-lover or friend, in order to seek revenge after a relationship has gone sour.”² More than 70% of nonconsensual pornography victims are women, and those who identify with a sexual minority are also more likely to be targeted.³

There are multiple actions that constitute revenge porn, and all of them share one central characteristic: the sharing or uploading of photographs and/or personal information to a website without the subject’s consent, and usually, although not always, with malicious intent. Although at the time that the photograph was taken the individual believes that there is little chance of the image being seen outside of the relationship, that is sadly not the case. Part of the risk in revenge porn is failure to see the frequency with which intimate photographs are taken, shared, and used against an individual. In one of the largest online surveys regarding intimacy and the digital world, McAfee, Inc. surveyed over 9,000 men and women internationally to gain insight into how people use technology in the bedroom.⁴ 13% of adults surveyed by McAfee had their

² *Revenge Porn By the Numbers*, END REVENGE PORN (Jan. 3, 2014), <http://www.endrevengeporn.org/revenge-porn-infographic/>.

³ Jordan Larson, *The New Pornographers*, THE AMERICAN PROSPECT (Oct. 7, 2013), <http://prospect.org/article/new-pornographers>.

⁴ Robert Siciliano, *Stop! Do You Really Want to Send That Photo?*, MCAFEE BLOG CENTRAL (Feb. 4, 2014), <http://blogs.mcafee.com/consumer/love-and-tech>.

personal content leaked without their permission.⁵ Furthermore, one in ten ex-partners had threatened to send intimate photographs of their former partner on the Internet.⁶ Of those who threatened to do this, nearly 60% followed through with their actions.⁷

Additionally, a Pew Research Center study revealed that four out of ten Internet users have experienced online harassment in varying degrees of severity, with men being more likely to have been victimized through name-calling and taunts, while women were targeted with sexual harassment and stalking.⁸ The study found that women aged 18-24 were subjected to severe harassment at disproportionately high levels, with 26% of these women having been stalked online, and 25% targeted with online sexual harassment.⁹ While it is possible that both men and women are equally vulnerable with nonconsensual pornography, the numbers show that women are more likely to be victimized by the crime.

C. *IsAnyoneUp.com* and the Proliferation of Revenge Porn

Revenge porn became more commonly known with the advent of the now-defunct website, *IsAnyoneUp.com*. This website was primarily used as a social networking and outreach platform for individuals who identified with the punk and post-hardcore music scenes.¹⁰ Its users were encouraged to submit scantily clad and nude photographs of themselves and others (so long

⁵ Press Release, McAfee for Business, Lovers Beware: Scorned Exes May Share Intimate Data and Images Online (Feb. 4, 2013), <http://www.mcafee.com/us/about/news/2013/q1/20130204-01.aspx>.

⁶ McAfee Press Release, *supra* note 5.

⁷ *Id.*

⁸ Maeve Duggan, *Online Harassment*, PEW RESEARCH CENTER (Oct. 22, 2014), <http://www.pewInternet.org/2014/10/22/online-harassment/>.

⁹ *Id.*

¹⁰ Emily Zemler, *Naked & Famous: How A Risqué New Website Pushes Boundaries and Buttons*, ALTERNATIVE PRESS (Feb. 14, 2011), http://www.altpress.com/features/entry/naked_famous_how_a_risque_new_website_pushes_boundaries_and_button

as they were confirmed to be over the age of eighteen), and there was little censorship with what was allowed to be published on the website.¹¹

IsAnyoneUp was the brainchild of Hunter Moore, who was heralded as “the most hated man on the Internet” for the period of time that the website was at peak popularity.¹² Relishing his notoriety, the high-school dropout created IsAnyoneUp in 2010 to share pictures of a girl that he had been having intimate relationship with, and it quickly became a loosely-moderated forum for individuals who cared to air grievances (and images) of past relationships or to promote their own online presence.¹³ At its peak, Moore’s website attracted between 188,000-300,000 unique viewers per day to examine his particular brand of entertainment.¹⁴ The average month could result in income of over \$13,000 for Moore, although most of that was spent on site upkeep and paying his legal and security staff.¹⁵

Moore created a cult of personality during his time at the helm of IsAnyoneUp, with an irreverent online demeanor and unfettered apathy towards the emotions of his targets and repercussions of his actions.¹⁶ He credited his success to giving people “what they want,” which included content that would be damaging and disparaging, while providing a method to seek revenge on those who had hurt them.¹⁷ IsAnyoneUp was one of the most prominent hubs for

¹¹ Alex Morris, *Hunter Moore: The Most Hated Man on the Internet*, ROLLING STONE (Nov. 13, 2012), <http://www.rollingstone.com/culture/news/the-most-hated-man-on-the-Internet-20121113>.

¹² *Id.*

¹³ Marlow Stern, *Hunter Moore, Creator of ‘Revenge Porn’ Website Is Anyone Up?, Is the Internet’s Public Enemy No. 1*, THE DAILY BEAST (Mar. 13, 2012), <http://www.thedailybeast.com/articles/2012/03/13/hunter-moore-creator-of-revenge-porn-website-is-anyone-up-is-the-internet-s-public-enemy-no-1.html>

¹⁴ *Id.*

¹⁵ Danny Gold, *The Man Who Makes Money Publishing Your Nude Pics*, THE AWL (Nov. 10, 2011), <http://www.theawl.com/2011/11/the-man-who-makes-money-publishing-your-nude-pics>.

¹⁶ *Id.*

¹⁷ Morris, *supra* note 11.

revenge porn until Moore sold the domain name to an anti-bullying organization, BullyVille.com, in April 2012.¹⁸

IsAnyoneUp saw its demise due to an FBI investigation into the legitimacy of the sources for the photos published to the website.¹⁹ Moore was arrested on January 23, 2014, along with Charles Evens, for conspiracy, seven counts of unauthorized access to a protected computer to obtain information, and seven counts of aggravated identity theft.²⁰ According to the indictment, Moore hired Evens to generate more content on the website by hacking into email and social media accounts of individuals in order to gain access to their personal information, photos, and contact information.²¹ Moore compensated Evens for his hacking work, and the images were posted to IsAnyoneUp without the consent of the individual.²² After arrest, Moore was charged with fifteen counts of hacking and other crimes. His posted bail was \$100,000, and the terms for his release involved a complete ban of the Internet.²³ However, Moore entered a plea deal on February 18, 2015, in which he pled guilty to unauthorized access to a computer, aiding and abetting unauthorized access to a computer, and identity theft.²⁴ On December 2, 2015, Hunter More was sentenced in District Court to 30 months in prison on the hacking and identity theft

¹⁸ Jessica Roy, *Revenge-Porn King Hunter Moore Indicted on Federal Charges*, TIME (Jan. 23, 2014), <http://time.com/1703/revenge-porn-king-hunter-moore-indicted-by-fbi/>.

¹⁹ Kashmir Hill, *How Revenge Porn King Hunter Moore Was Taken Down*, FORBES (Jan. 24, 2013, 11:16AM), <http://www.forbes.com/sites/kashmirhill/2014/01/24/how-revenge-porn-king-hunter-moore-was-taken-down/>.

²⁰ Press Release, The Fed. Bureau of Investigation, L.A. Div., Two California Men Arrested in E-Mail Hacking Scheme That Yielded Nude Photos That were Posted on 'Revenge Porn' Website (Jan. 23, 2014), <http://www.fbi.gov/losangeles/press-releases/2014/two-california-men-arrested-in-e-mail-hacking-scheme-that-yielded-nude-photos-that-were-posted-on-revenge-porn-website>.

²¹ *Id.*

²² *Id.*

²³ *No, Twitter, Revenge Porn Pioneer Hunter Moore Has Not Made A Triumphant Online Return*, THE SMOKING GUN (Jan. 24, 2015), <http://www.thesmokinggun.com/buster/hunter-moore/hunter-moore-twitter-hack-907841>.

²⁴ Jamie Condliffe, *Revenge Porn Kingpin Hunter More Pleads Guilty (to Hacking, ID Theft)*, GIZMODO (Feb. 19, 2015), <http://gizmodo.com/revenge-porn-kingpin-hunter-moore-pleads-guilty-to-hac-1686717008>.

charges.²⁵ He was also sentenced to three years of supervised release on charges of unauthorized access to a computer to obtain information for purposes of private financial gain and aggravated identity theft, as well as ordered to pay a fine of \$2,000 and to inform his probation officer of any computer or device he uses to access the Internet after his release, in addition to opening those devices to search and seizure.²⁶

However, despite the media coverage and controversy surrounding the takedown of IsAnyoneUp and Hunter Moore, nonconsensual pornography is still rampant on the Internet. Although the websites have not gained a similar level of public knowledge and notoriety, there are still several large online purveyors of revenge porn, and each has had several attempts to take the website down – only to have it resurface under the same domain name, or one with a marginally different spelling or formatting.²⁷ Websites such as Anon-IB.ch, MyEx.com, and TheDirty.com are all known to host images similar in nature to those that IsAnyoneUp would have posted.²⁸ Anon-IB in particular has sorted their photos by category, with different pages devoted to “Accidental Nude,” “Peeping Toms,” and “ExGF.”²⁹ It seems fair to assume that the majority of women featured on the website did not consent to their photos being posted, and there are scores of “bounty” comments throughout the site that solicit photos of particular individuals – nearly all of whom are young women.³⁰ MyEx openly touts itself as a revenge porn hotspot, with the banner of the website proudly proclaiming that users can “get revenge” on their

²⁵ Daniel Siegal, *Calif. ‘Revenge Porn King’ Gets 30 Months in Prison*, LAW360 (Dec. 2, 2015), <http://www.law360.com/california/articles/733659>.

²⁶ Megan Guess, *Hunter Moore of “IsAnybodyUp” notoriety sentenced to 30 months in prison*, ARSTECHNICA (Dec. 3, 2015), <http://arstechnica.com/tech-policy/2015/12/hunter-moore-of-isanybodyup-notoriety-sentenced-to-30-months-in-prison/>.

²⁷ DREW IS DOPE, <http://drewisdope.com/2014/01/26/revenge-porn-sites-like-isanyoneup-com-there-are-still-a-few/> (last visited Mar. 15, 2015).

²⁸ *Id.*

²⁹ ANON-IB, <http://anon-ib.su/> (last visited Mar. 14, 2015).

³⁰ ANON-IB, *supra* note 29.

ex-lovers through the website.³¹ The website also reinforces that it is driven by user-submitted content, and that if an individual wants their photo removed from the website, a lengthy process – replete with a hierarchy of request priorities and identification measures – is necessary.³²

At the bottom of the page, MyEx gives a word of warning to those looking for a way to remove their photos from the website: “As a general rule if you don’t want photos of you ending up on the Internet be more careful who you send them too [sic] or better yet don’t send them at all.”³³ This victim-blaming sentiment is characteristic of the attitudes of those who engage in the distribution of nonconsensual pornography, and serves to prove the urgent need to criminalize revenge pornography.

II: HISTORY AND ANALYSIS OF 18 USC §2261A(2)

A. Use of Cyberstalking Legislation to Criminalize

One avenue of potential criminalization for revenge porn that remains under-explored was first introduced in 1996 with the Violence Against Women Act.³⁴ 18 U.S.C. Section 2261A covers interstate and cyber stalking, including actions that require the use of interactive computer services and electronic communication services and systems. With regard to online services in particular, the current version of §2261A states:

Whoever –

³¹ MYEX.COM, <http://www.myex.com/> (last visited Mar. 14, 2015).

³² *My-Ex.com Removal Policy*, MYEX.COM, <http://www.myex.com/removal-policy/> (last visited Mar. 14, 2015).

³³ *Id.*

³⁴ 18 U.S.C.A. § 2261A (West 2014).

(2) with the intent to kill, injure, harass, intimidate, or place under surveillance with intent to kill, injure, harass, or intimidate another person, uses the mail, any interactive computer service or electronic communication service or electronic communication system of interstate commerce, or any other facility of interstate or foreign commerce to engage in a course of conduct that--

(A) places that person in reasonable fear of the death of or serious bodily injury to a person described in clause (i), (ii), or (iii) of paragraph (1)(A); or

(B) causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress to a person described in clause (i), (ii), or (iii) of paragraph (1)(A),

shall be punished as provided in section 2261(b) of this title.³⁵

This most recent iteration of the law, approved in October 2013, is significantly different from previous versions of the statute. The history and development of §2261A gives insight into the shifts in cultural perception of stalking, and how the advent of the Internet changed the nature, prevalence, and means of prosecuting the crime itself.

B. Introduction of Stalking Legislation with Early Additions to the Violence Against Women Act

Stalking was already a crime in many states before interstate stalking became federally criminalized with the additions in 1996 to the Violence Against Women Act.³⁶ Called the Interstate Stalking Punishment and Prevention Act, this first version of the statute was introduced to the House of Representatives on February 26, 1996, by Representative Edward R. Royce.³⁷

³⁵ 18 U.S.C. §2261A (West 2014).

³⁶ *Domestic Violence, Stalking, and Antistalking Legislation: An Annual Report to Congress Under the Violence Against Women Act*, 1996 NAT'L INST. OF JUST. 4.

³⁷ All Bill Information for the Interstate Stalking Punishment and Prevention Act of 1996, H.R.2980, 104th Cong. (1996), <https://www.congress.gov/bill/104th-congress/house-bill/2980/all-info>.

The act went through to be approved in both the House and the Senate in May and July of 1996, respectively.³⁸ The Act was made into law in July 1996, with the implementation of Public Law 104-201, the National Defense Authorization Act for Fiscal Year 1997.³⁹ This version of the Act provided a basic structure for what constitutes interstate stalking, including the intent requirements of injuring or harassing another person. The Act also mandated a requirement for physical crossing of state lines.⁴⁰ The Interstate Stalking Punishment and Prevention Act was active law from September 26, 1996 through October 27, 2000.⁴¹

In 2000, the Interstate Stalking Punishment and Prevention Act was amended. The amendments came as part of the Victims of Trafficking and Violence Prevention Act of 2000.⁴² The amendments came within Division B of the larger legislation, titled the Violence Against Women Act of 2000, and several major changes were implemented in this version of the law.⁴³ The title of the act was shortened to Interstate Stalking Act, and it included provisions such as covering situations where perpetrators travel in interstate or foreign commerce or Indian territory, including travel with the intent to kill.⁴⁴ Additionally, this version of the law defined a “course of conduct” to mean a pattern of conduct composed of two or more acts, evidencing a continuity of purpose.⁴⁵ Furthermore, the 2000 amendment implemented a new definition for "spouse or intimate partner," which was expanded to cover a spouse or former spouse of the target of a stalking, a person who shares a child in common with the target, and a person who

³⁸ *Id.*

³⁹ National Defense Authorization Act for Fiscal Year 1997, H.R. 3230, 104th Cong. (1996), <https://www.congress.gov/bill/104th-congress/house-bill/3230/text>.

⁴⁰ 18 U.S.C.A. § 2261A (West 1996).

⁴¹ *Id.*

⁴² Victims of Trafficking and Violence Protection Act of 2000, H.R. 3244, 106th Cong. (2000), <https://www.congress.gov/bill/106th-congress/house-bill/3244>.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Victims of Trafficking and Violence Protection Act of 2000, *supra* note 42.

cohabits or has cohabited as a spouse with the target.⁴⁶ The VAWA 2000 version of the Interstate Stalking Act was active from October 28, 2000 through January 4, 2006.⁴⁷

C. VAWA 2005 and Amendments to §2261A

In 2005, §2261A underwent several of its most radical changes to date. The new amendments were included as part of the Violence Against Women Reauthorization Act of 2005, which was first suggested on June 14, 2005.⁴⁸ Due to the changing landscape of technology and the proliferation of the Internet in the early 2000s, the amendments to the 2000 version of the law included several alterations to the definition of stalking.⁴⁹ The 2005 amendments included language that criminalized stalking that occurred with the use of the Internet, with the amended statute proscribing the use of “the mail, any interactive computer service, or any facility of interstate or foreign commerce to engage in a course of conduct that causes substantial emotional distress to that person or places that person in reasonable fear of the death of, or serious bodily injury.”⁵⁰

Furthermore, this new version of §2261A was a change from the previous text of the law because it included consideration of substantial emotional harm to the stalking victim, in addition to the act of placing someone under surveillance with the intent to kill, injure, harass, or intimidate him or her.⁵¹ It was with this version of §2261A that cases in the family of

⁴⁶ *Id.*

⁴⁷ 18 U.S.C.A. § 2261A (West 2000).

⁴⁸ Violence Against Women Reauthorization Act of 2005, H.R. 2876, 109th Cong. (2005), <https://www.congress.gov/bill/109th-congress/house-bill/2876>.

⁴⁹ Violence Against Women and Department of Justice Reauthorization Act of 2005, H.R. 3402, 109th Cong. (2006), <https://www.congress.gov/bill/109th-congress/house-bill/3402/text>.

⁵⁰ Violence Against Women and Department of Justice Reauthorization Act of 2005, *supra* note 49.

⁵¹ *Id.*

nonconsensual pornography case law begin to arise. However, two cases are of particular importance in shaping the future amendments to §2261A during the period of time between when the law was first implemented on January 5, 2006 and when it became obsolete on September 30, 2013.⁵² These cases are *United States v. Cassidy* and *United States v. Petrovic*.

In 2012, *United States v. Petrovic* was heard in the 8th Circuit.⁵³ In this situation, Jovica Petrovic and the victim, M.B., began a relationship in 2006, married in 2009, and were divorced shortly after.⁵⁴ M.B. was 20 years younger than Petrovic and resided in Missouri while Petrovic resided in Florida.⁵⁵ Over the course of their relationship, Petrovic took photographs and saved text messages from M.B. that were of an extraordinarily personal nature, ranging from images of her performing sexual acts on him to communications about her history of sexual abuse and suicidal tendencies.⁵⁶ M.B. tried to commit suicide in Petrovic's home in July 2009, and Petrovic photographed the blood that remained on the floor after she was taken to the hospital.⁵⁷ M.B. notified Petrovic in December 2009 that she wished to end the relationship, and in response, Petrovic sent her messages that he contends were not blackmail, but instead served to “notify” her of the imminent threat to post the photos and personal information he possessed of her to the Internet if she continued to terminate the relationship.⁵⁸ Petrovic then sent out over 150 pornographic, handmade postcards of M.B. to her family, friends, acquaintances, and colleagues,

⁵² 18 U.S.C.A. § 2261A (West 2006).

⁵³ *United States v. Petrovic*, 701 F.3d 849, 852 (8th Cir. 2012).

⁵⁴ *Id.*

⁵⁵ Robert Patrick, *Man Sentenced in St. Louis to 8 Years for Cyberstalking Wife*, ST. LOUIS POST-DISPATCH (Feb. 15, 2012), http://www.stltoday.com/news/local/crime-and-courts/man-sentenced-in-st-louis-to-years-for-cyberstalking-wife/article_88b15634-5805-11e1-914a-001a4bcf6878.html.

⁵⁶ *Petrovic*, 701 F.3d, at 852.

⁵⁷ *Id.*

⁵⁸ *Id.* at 853-4.

and created a website that contained a comprehensive archive of the images and personal text messages.⁵⁹

The court held in October 2010 that Petrovic was guilty of interstate stalking and interstate extortionate threat, and although he appealed both those convictions, they were affirmed.⁶⁰ Although Petrovic argued on appeal that M.B.’s emotional distress was caused by her pre-existing medical and psychological conditions, the court did not agree. It found that M.B. “reasonably” suffered substantial emotional distress due to the actions of Petrovic, and this reasonableness evaluation found a place in the 2013 version of the law. Additionally, this case has great precedential value because it was one of the first federal cases in which the court went into detail on the first amendment implications of §2261A, and much of *Petrovic* has been cited in more recent federal cases.⁶¹

A 2011 case titled *United States v. Cassidy* was one of the first to tackle the issue of cyberstalking and the applicability of First Amendment rights on the Internet in the context of §2261A. In the case, which does not concern nonconsensual pornography, Cassidy befriended members of a Buddhist sect where the female victim, A.Z., was a highly-ranked spiritual leader.⁶² Cassidy lied about his affiliation with the sect and developed a friendship with A.Z. in which she disclosed personal details about her life. However, a year later his true identity was uncovered and he left the retreat.⁶³ After his departure, Cassidy used Twitter and blogging

⁵⁹ Nicholas Phillips, *Jovica Petrovic Sentenced for Cyber-Stalking, Extorting Ex-Wife*, RIVERFRONT TIMES (Feb. 15, 2012), http://blogs.riverfronttimes.com/dailyrft/2012/02/jovica_petrovic_sentencing_cyber-stalking_extortion_autrey_sauer_stenger.php.

⁶⁰ *Petrovic*, 701 F.3d, at 853, 860.

⁶¹ *Petrovic*, 701 F.3d, at 854-56.

⁶² *United States v. Cassidy*, 814 F.Supp.2d 574, 578 (D.M.D. 2011).

⁶³ *Id.*

platforms such as Blogspot to harass the sect and A.Z. in particular.⁶⁴ The tweets and blogging entries made statements pertaining to A.Z. and derogatory statements about the sect, which allegedly caused A.Z. to fear for herself and the members of the sect to the extent that she did not leave her house for a year and a half.⁶⁵ The court found that the alleged violation of the statute by Cassidy's Twitter and blog posts fell under the content-based restriction of the First Amendment because they were speech that was emotionally distressing to A.Z., and mere distressing speech isn't prohibited by the first amendment.⁶⁶ Additionally, the court found that A.Z. and the Buddhist sect were not private individuals, but instead religious and public figures.⁶⁷ Because of this, the statute was found to prohibit freedom of speech that was religious and political in nature, which is a category of speech that the Supreme Court has consistently protected.⁶⁸

The case of *United States v. Cassidy* was a blow to cyberstalking and nonconsensual pornography advocacy because the court held that the application of §2261A in that particular context rendered the law unconstitutional as applied, and that the law was structured to have a content-based restriction on speech.⁶⁹ Because of this, it was integral that changes be made to the law to allow it to stand in other similar situations.

D. Modern Law and VAWA 2013

In 2013, the House and Senate passed the Violence Against Women Reauthorization Act of 2013, and it was enacted on March 7 of that year. §2261A went through a radical set of

⁶⁴ *Id.* at 578-79.

⁶⁵ *Id.* at 579.

⁶⁶ *Cassidy*, 814 F.Supp.2d at 584.

⁶⁷ *Id.* at 586.

⁶⁸ *Cassidy*, 814 F.Supp.2d, at 586.

⁶⁹ *Id.* at 588.

changes with the passage of these laws, including several expansions of coverage and new definitions for key terms. New language regarding “presence” was added to jurisdictional elements, and “intimidate” was added to a list of intended actions.⁷⁰ Furthermore, the emotional distress element was expanded such that the crime currently encompasses when one “causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress.”⁷¹ Most significantly, though, a cyberstalking section was added. This section eliminates the need for interstate travel or physical stalking, and instead includes the use of electronic communication servers or electronic communication systems of interstate commerce to achieve the same ends as traditional stalking.⁷² The structure of the law was also changed such that it now clearly proscribes a course of conduct and not speech, thereby avoiding the issues seen in *Cassidy*. These changes to §2261A are very recent, as they were only implemented on October 1, 2013.⁷³

III: RELEVANT CURRENT CASE LAW USING §2261A(2) AND ITS IMPLICATIONS ON NONCONSENSUAL PORNOGRAPHY

Although §2261A has had much case law progeny surrounding more “conventional” stalking and harassment cases, the same cannot be said with regard to its use in cases that involve elements of nonconsensual pornography. Given that the crime itself is of recent mint, and the statute has changed significantly over the past two decades, it is not surprising that a search for

⁷⁰ *Stalking Resource Center*, NAT’L CENTER FOR VICTIMS OF CRIME (2013), <http://www.victimsofcrime.org/docs/src/vawa-2013-and-stalking.pdf?sfvrsn=2>.

⁷¹ *Id.*

⁷² *Stalking Resource Center*, *supra* note 70.

⁷³ 18 U.S.C.A. § 2261A (West 2013).

relevant cases only procures a handful of results. However, two cases from 2014, which utilize the 2006 version of the law, have been important in gauging how the federal courts analyze and rule in situations that involve nonconsensual pornography. *United States v. Sayer* and *United States v. Osinger* have proven instrumental in determining the path of analysis courts consider when reviewing cases involving revenge porn.

A. *United States v. Osinger*

1. Case History

The case of *United States v. Osinger* (2014) is one of the exemplary cases in the small body of revenge porn case law surrounding §2261A, as it implicates the first convicted “Facebook Stalker.”⁷⁴ In *Osinger*, the defendant challenged his conviction based on his belief that §2261A was facially unconstitutional for vagueness, and that it was also inappropriately applied to his conduct.⁷⁵ The defendant and the victim, V.B., were in a relationship for nine months before V.B. ended the affair upon discovering that Osinger was not divorced, as he had previously told her he was.⁷⁶ The two had been living together at the time, and the victim moved out and began living in a different apartment immediately after she discovered his marriage.⁷⁷ V.B. did not inform Osinger of her new address due to the fact that she did not want him to contact her, but regardless, Osinger contacted her sister-in-law to try to find out where she was living. Despite V.B.’s repeated protestations and refusals for his attention and conversation, Osinger was adamant about contacting her and repeatedly came to her new residence at early

⁷⁴ *Crime and Punishment*, L.A. TALK RADIO (Feb. 5, 2015), <http://www.lataalkradio.com/Crime.php>.

⁷⁵ *United States v. Osinger*, 753 F.3d 939, 941 (9th Cir. 2014).

⁷⁶ *Id.*

⁷⁷ *Id.*

hours of the morning and came to her place of work several times.⁷⁸ Eventually, V.B. relocated to California for a new job, but still continued to receive text messages from Osinger.⁷⁹ The nature of the text messages grew threatening and more ominous, and V.B. was concerned that Osinger was in possession of sexually explicit photos and videos of her that were consensually taken during the duration of their relationship.⁸⁰

Sure enough, Osinger had created a Facebook page in V.B.'s name, albeit with a minor spelling change, that contained explicit photos and videos of her.⁸¹ The content on the Facebook page included over 30 photos of V.B., many of them showing her in the middle of sexual acts or displaying her topless or bottomless, filed neatly into two albums titled "WHORE" and "WHORE2."⁸² Captions on each of the images, written to seem like they were said by V.B., contained overtly sexual and lascivious invitations for the website's visitors to contact her for more images and videos.⁸³ Furthermore, the images and links to the Facebook page were distributed to V.B.'s boss, coworkers, family, friends, and even ex-boyfriends.⁸⁴ Throughout the entire ordeal, V.B. was "very, very disturbed" and repeatedly expressed sentiments of fear and concern over what actions Osinger would do next.⁸⁵

2. Significance of *Osinger* and the Court's Opinion

The path that was taken by the courts to reject Osinger's claims of facial unconstitutionality and misapplication of the law provides insight into both how the courts

⁷⁸ *Id.*

⁷⁹ *Id.* at 942

⁸⁰ *Osinger*, 753 F.3d, at 942.

⁸¹ *Id.*

⁸² *Id.* at 952.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

respond to cases of nonconsensual pornography, and the potential for application in similar situations. There were three main components to the Circuit Court’s analysis for both Osinger’s claims: (1) analyzing the First Amendment in context; (2) taking a look at the “course of conduct;” and (3) the clarification of intent.

With regard to the First Amendment, the Ninth Circuit relies heavily on the Eighth Circuit’s decision in *United States v. Petrovic* for its analysis. *Petrovic* affirmed §2261A as constitutionally valid under the First Amendment because the language in the statute addresses the actions involved in a stalking incident, not the speech necessarily associated with those actions.⁸⁶ By differentiating between the actual conduct done within a stalking incident and the sentiments expressed during the course of the incident, §2261A avoids problems that would ordinarily arise with claims of protected speech. In relying on *Petrovic*, the court echoes the 8th Circuit’s reasoning that the statute, which “proscribes harassing and intimidating conduct [...] is not facially invalid under the First Amendment.”⁸⁷

However, these First Amendment implications bring up an interesting and crucial exception to protected speech. Even in the context of the First Amendment’s protections against laws that abridge freedom of speech, the Supreme Court “has carved out some limited categories of unprotected speech, including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct.”⁸⁸ With this in mind, Osinger’s content falls squarely under the category of speech integral to criminal conduct. Because he had the intent to harass, intimidate, or cause substantial emotional distress to the victim, the speech that he engaged in during those actions

⁸⁶ *Osinger*, 753 F.3d, at 944.

⁸⁷ *Id.*

⁸⁸ *Id.* at 946 (citing *United States v. Meredith*, 685 F.3d 814, 819 (9th Cir. 2012)); see *United States v. Stevens*, 559 U.S. 460, 460 (2010) (citing *Chaplinsky v. N.H.*, 315 U.S. 568, 572 (1942)).

did not fall under First Amendment protection. The actions that Osinger took – threatening V.B., creating a false Facebook page with her explicit photographs, and disseminating lewd emails to her friends and network – were therefore not under the umbrella of protected speech because they were involved in the crime of stalking under §2261A.⁸⁹

The court also examines how the actions the defendant took fell under the “course of conduct” requirement in §2261A. While Osinger argued that his speech was protected and therefore unable to be prosecuted, the court ruled differently.⁹⁰ Given that they found that his speech fell under the category of actions that were done in furtherance of a criminal act, they viewed his various online exploits as evidence of a course of conduct under §2261A.⁹¹ Osinger satisfied the course of conduct standard, which is characterized as a pattern of conduct of two or more acts, by his threats, emails and creation of the falsified Facebook page.⁹² Critical analysis of the case highlights the course of conduct standard when discussing the consistency of federal rulings regarding recent cases of nonconsensual pornography.⁹³ The opinion in *Osinger* “confirms that in the view of federal appeals courts, a person who engages in the nonconsensual posting of explicit material can be validly targeted under the federal anti-stalking law when it’s part of a course of conduct (which it often is).”⁹⁴ Osinger was aware that his conduct was harassing and intimidating, and the multiple instances of the dissemination of the victim’s images and personal information satisfied the conduct requirement.

⁸⁹ *Id.* at 945.

⁹⁰ *Osinger*, 753 F.3d, at 946-47.

⁹¹ *Id.* at 947

⁹² *Id.*

⁹³ Venkat Balasubramani, *Revenge Porn/Cyberstalking Conviction Doesn’t Violate First Amendment—US v. Osinger*, TECHNOLOGY & MARKETING LAW BLOG (June 6, 2014), <http://blog.ericgoldman.org/archives/2014/06/revenge-porn-cyberstalking-conviction-doesnt-violate-first-amendment-us-v-osinger.htm>.

⁹⁴ *Id.*

The *Osinger* case also highlights important analysis regarding the intent requirement of §2261A. The text of the law, at the time the case was tried, held that the requisite intent be to “kill, injure, harass, or place under surveillance with intent to kill, injure, harass, or intimidate, or cause substantial emotional distress” by using “any interactive computer service.”⁹⁵ This intent phraseology places a specific scienter requirement on the defendant: it requires him or her to have the requisite intent to cause harm while conducting his ultimately harmful actions.⁹⁶ Even when *Osinger* claimed that he did not know his actions in and of themselves were illegal, the intent he possessed to harm V.B. was enough for his behavior to satisfy the intent requirement and lead to conviction.⁹⁷

However, despite the fact that *Osinger* was on its face a victory against the act of disseminating nonconsensual pornography, it has been hailed as being unsupportive of promoting revenge porn legislation and precedent. The “speech integral to criminal conduct” language has been criticized as being circular, and more critically, the case has its roots within the actual physical conduct of cyberstalking. Outside analysis of the *Osinger* opinion makes the vital point that the defendant used his right to free speech as a sword rather than a shield in this situation, and he attempted to use “his revenge porn posting to overcome his criminal conduct, as if his free speech rights were sufficient to compel the court to ignore his physical conduct.”⁹⁸ In using his right to free speech as the impetus for his actions of stalking, the speech then becomes integral to criminal conduct and therefore punishable under the statute. This creates a situation where some of what *Osinger* said or posted regarding V.B. may have ordinarily been insulated

⁹⁵ *Osinger*, 753 F.3d, at 943, n. 1.

⁹⁶ *Id.* at 945.

⁹⁷ *Id.*

⁹⁸ Scott H. Greenfield, *Osinger, The Revenge Porn Holding That Wasn't*, SIMPLE JUSTICE (June 7, 2014), <http://blog.simplejustice.us/2014/06/07/osinger-the-revenge-porn-holding-that-wasnt/>.

from prosecution due to free speech rights, but because it was ultimately in furtherance of the act of stalking, it was subject to legal scrutiny.⁹⁹

B. *United States v. Sayer*

1. Case History

United States v. Sayer (2014) is a case that illustrates a woman's worst nightmares at the end of a bad breakup, and involves elements of stalking, harassment, the dissemination of nonconsensual pornography, and nonconsensual sexual solicitation of the woman on multiple online platforms and pages.¹⁰⁰ In *Sayer*, the victim, Jane Doe, and Sayer both lived in Maine and were in a relationship from 2004 until January 2006.¹⁰¹ However, at the dissolution of the relationship, Sayer began stalking Jane Doe for a four-year period. Sayer started arriving at places where she was usually found or was likely to go.¹⁰² Jane Doe changed her routine to avoid seeing Sayer, and in October 2008 she began having unknown, "dangerous-looking" men arrive at her house with the expectation of "sexual entertainment."¹⁰³ This was because Sayer had posted her name, photos of her in lingerie that were taken at the time they were dating, detailed directions to her home, and a list of sexual acts that she would be willing to perform under the "casual encounters" classified section of Craigslist.¹⁰⁴ These visits from strange men continued

⁹⁹ Greenfield, *supra* note 98.

¹⁰⁰ Susan Brenner, *Wi-Fi, Curtilage, and Kyllo*, **Cyb3rcrim3** (June 27, 2012), <http://cyb3rcrim3.blogspot.com/2012/06/wi-fi-curtilage-and-kyllo.html>.

¹⁰¹ *United States v. Sayer*, 748 F.3d 425, 428 (1st Cir. 2014).

¹⁰² *Id.* at 428

¹⁰³ *Id.*

¹⁰⁴ *Id.*

for eight months, until Jane Doe changed her name and moved, without telling anyone but her parents and a neighbor, to her aunt's house in Louisiana in June 2009.¹⁰⁵

On August 25, 2009, a man arrived at her home and asked for her by her new name, stating that he was at her house for a sexual encounter that had been advertised on a pornography website.¹⁰⁶ An Internet search after this altercation revealed photos and videos of Jane Doe and Sayer engaged in sexual activity that had taken place during their relationship, and viewers of the material were encouraged to comment and write to Jane Doe. The material was posted on at least three websites.¹⁰⁷ Circumstances such as this continued throughout 2009, with Sayer creating a fraudulent Facebook page and Myspace profile.¹⁰⁸ Police were able to track the IP addresses from which each of the profiles was created and accessed, and found that they were sourced from unrestricted wireless networks located in Sayer's neighborhood and businesses close to where he lived.¹⁰⁹ Sayer's behavior continued until state police arrested him in July 2010 for the violation of a protection order that Jane Doe had placed against him.¹¹⁰

2. Significance of *Sayer* and the Court's Opinion

Sayer challenged his conviction on the grounds that §2261A was inapplicable as applied, and that the law was constitutionally overbroad on its face.¹¹¹ The court's reasoning in handling both of those claims gives insight into how the justice system's opinions on nonconsensual

¹⁰⁵ *Sayer*, 748 F.3d, at 428.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 428-29

¹⁰⁹ *Id.* at 429

¹¹⁰ *Sayer*, 748 F.3d, at 429.

¹¹¹ *Id.* at 433-36.

pornography are shaped, and is also indicative of the changing interpretations of free speech as it applies to private persons in the context of nonconsensual pornography.

The Court of Appeals heard first Sayer's argument on the as-applied First Amendment challenge, and found it to be meritless.¹¹² Although Sayer argued that because his course of conduct included speech and online communications, and therefore should fall under protections of the First Amendment, the First Court of Appeals echoed the holding in *Petrovic* and found that speech integral to criminal conduct does not fall under the category of protected speech.¹¹³

However, it is within the part of the opinion that analyzes Sayer's claim of §2261A's facial unconstitutionality that language regarding the nature of nonconsensual pornography comes into play. Sayer challenged the statute's facial validity with a misunderstanding of what "substantial emotional distress" is, as he operated under the impression that that particular legal standard also proscribed content that was simply insulting or bothersome.¹¹⁴ The court, however, made it clear that the interstate stalking statute encompasses conduct done with clear requisite intent, including intent to cause substantial emotional distress, and "clearly targets conduct performed with serious criminal intent, not just speech that happens to cause annoyance or guilt."¹¹⁵

This seemingly innocuous clarification of what conduct the statute prohibits becomes quite relevant to future cases and legal interpretation when viewed in the light of nonconsensual pornography. The conduct (the dissemination of nonconsensual pornography) was described as clearly targeting a victim with serious criminal intent, and that the speech involved stretches past

¹¹² *Sayer*, 748 F.3d, at 433.

¹¹³ *Id.* at 433-34.

¹¹⁴ *Id.* at 435.

¹¹⁵ *Id.*

the point of being simply annoying or insulting.¹¹⁶ This analysis goes directly to how courts should view revenge porn as an entire criminal activity. The act of planning, uploading, and executing the content, which has no public necessity, is more than just mere “annoyance or insult” and goes to the criminally proscribed emotional distress standard.

Furthermore, the court placed particular emphasis on the fact that Sayer encouraged people to contact Jane Doe in person, and made it easy for men to come to her home and potentially harm her.¹¹⁷ Jane Doe was “not free to ignore” this type of conduct, and her inability to ignore what Sayer had done meant that Sayer’s actions went beyond the scope of mere communication. However, it could be argued that communications that escalate to conduct that one is “not free to ignore” could apply to cases where the conduct is still online, but the individual cannot escape the pervasive and invasive nature of the communications. In a nonconsensual pornography situation where a woman’s photos have been leaked, she is oftentimes not free to ignore the fact that a Google search may show those images as a top search result, or that an employer may discriminate against her on the assumption that she placed those images there herself.¹¹⁸ Although the *Sayer* court used the “not free to ignore” language as dicta in the case, the potential exists to apply this inability to avoid the consequences of the perpetrator’s actions in other cases of nonconsensual pornography to establish criminal intent or conduct.

¹¹⁶ *Sayer*, 748 F.3d, at 435.

¹¹⁷ *Id.*

¹¹⁸ Telephone Interview with Carrie Goldberg, Board Member and Volunteer Attorney, Cyber Civil Rights Initiative (Feb. 17, 2015).

IV: POTENTIAL FEDERAL SOLUTIONS BY AMENDING THE CYBERSTALKING STATUTE

A. Why Should We Amend §2261A?

There have been dozens of news stories, law review articles, blog posts, and public interest stories drifting around various social circles on the Internet that stress how problematic the issue of nonconsensual pornography is and how a federal law should be implemented to end the harmful practice. Although several states have passed legislation and even more are currently in the process of drafting laws, creating a means of prosecuting the crime federally is of paramount importance for several reasons. These reasons include jurisdictional complications and the significance of the perpetrator being prosecuted for a federal felony.

One of the most compelling reasons for pushing legislative bodies for a federal law criminalizing nonconsensual pornography is the issue of jurisdiction. Jurisdictional issues arise when dealing with the different states that have, or have not, implemented their own state statutes that outlaw the dissemination of revenge porn.¹¹⁹ If a victim lives in a state that does not have a law that criminalizes the act, then that individual would be hard-pressed to find a legal remedy to assist them with their quest for justice under that circumstance.¹²⁰ At the time of writing, only twenty-six states have successfully passed laws that criminalize the practice of disseminating nonconsensual pornography.¹²¹ Although twelve states have introduced bills into their respective legislatures regarding the crime, it is still to be seen whether any or all of them

¹¹⁹ Mary Anne Franks, *Why We Need A Federal Criminal Law Response to Revenge Porn*, CONCURRING OPINIONS (Feb. 15, 2013), <http://concurringopinions.com/archives/2013/02/why-we-need-a-federal-criminal-law-response-to-revenge-porn.html>.

¹²⁰ *Id.*

¹²¹ Carrie Goldberg, *States With Revenge Porn Criminal Laws* (Jan. 26, 2016), <http://www.cagoldberglaw.com/states-with-revenge-porn-laws>.

are approved.¹²² In an age where the use of the Internet is so pervasive, it comes as no surprise that many instances of nonconsensual pornography are facilitated online. With most states lacking statutory provisions or only providing limited jurisdiction, victims of nonconsensual pornography face a dead end when attempting to prosecute instances of the crime that go beyond their state borders.

In contrast to the punishments available at the state level, creating federal implications for the dissemination of nonconsensual pornography will allow for more rigid punishment. Because the crime of stalking is a federal criminal offense, perpetrators of nonconsensual pornography who are convicted under this statute will face the social, governmental, and financial repercussions that come with a federal felony offender status. The statutory maximum for stalking that does not involve the use of a dangerous weapon or result in physical harm to the victim due to injury is five years.¹²³ As shown in the cases of *Osinger* and *Sayer*, courts are not reluctant to impose hefty sentences for crimes that involve nonconsensual pornography: the defendant in *Osinger* received a forty-six-month sentence, and in *Sayer* the defendant received the maximum sixty-month imprisonment.¹²⁴

Other than prison sentences, though, a court's imposition of felony offender status on an individual carries a burden that restricts many of his or her basic daily actions and can often impede rights and privileges. One of the major consequences of a felony conviction is the potential for disenfranchisement, as the revocation of the right to vote is an outward revocation

¹²² *Id.*

¹²³ 18 U.S.C.A. § 2261 (West 2014).

¹²⁴ *Osinger*, 753 F.3d, at 942; *Sayer*, 748 F.3d at 428.

of one of the basic rights afforded to US citizens.¹²⁵ Additionally, a federal felony conviction restricts a citizen's right to serve on a jury.¹²⁶ Other so-called collateral consequences of having a felony criminal record, however, are at least equally burdensome for the perpetrator of nonconsensual pornography. An estimated 87% of employers perform background checks on potential employees, and seeing a federal felony conviction may have negative consequences.¹²⁷ The retributive aspects of felony conviction, as opposed to the misdemeanor conviction most common at the state level, is a compelling reason for why victims would benefit from seeking justice at a federal level and why §2261A should be amended to be as relevant as possible.¹²⁸

B. Issues and Proposals for the Future of §2261A

In the time since *Osinger* and *Sayer* were decided, §2261A has been significantly amended. This most current version of the law is the most comprehensive yet, and offers the greatest opportunity for the prosecution of the dissemination of nonconsensual pornography. Major differences between the current version of the statute and the pre-2013 amendments include: (1) the removal of language that the victim and the perpetrator must be within separate states in cases that involve mail, any interactive computer service or electronic communication service, (2) the addition of formatting that clarifies the subsections, and (3) expanded language regarding emotional distress to encompass attempts or reasonable expectation.¹²⁹ Although there

¹²⁵ *Federal Statutes Imposing Collateral Consequences Upon Conviction*, UNITED STATES DEPT. OF JUSTICE, http://www.justice.gov/sites/default/files/pardon/legacy/2006/11/13/collateral_consequences.pdf (last visited Jan. 24, 2016).

¹²⁶ *Id.*

¹²⁷ *Id.* at 9.

¹²⁸ Goldberg, *supra* note 121. Most states with revenge porn laws classify the crime as a misdemeanor. Out of the sixteen states with statutes that criminalize nonconsensual pornography, nine states make the crime a misdemeanor. States include Colorado, Maryland, Pennsylvania, and California.

¹²⁹ 18 U.S.C.A. § 2261A (West 2013).

has not been a great deal of critical analysis on the current iteration of the law, what follows are insight into elements of the law and suggestions for amendment that would enable §2261A to successfully encompass actions that would implicate perpetrators of nonconsensual pornography.

1. The Discouraging Problem With Intent

Although there are tangible parts of §2261A that lend themselves to amendments that would help to criminalize nonconsensual pornography, a more difficult area of the law to impart change is with the intent elements. Intent is a crucial part of §2261A, and the gradual adaptation of the statute to the version that is currently valid law today shows the extent of change over time as to what the public perception of stalking is. The statute's adaptation also reflects the importance and harmful nature of the crime. The modern iteration of the statute includes the intent to harass, kill, injure, or intimidate a target, or to place the victim under surveillance with the intent to harass, kill, injure, or intimidate.¹³⁰ These current categories of intent have successfully covered many of the behaviors related to stalking that have also had related acts of nonconsensual pornography also attached to them, but there are situations that they do not encompass. Under circumstances where the perpetrator uses the Internet to display intent that may not be indicative of an immediate means of intimidation, the current law falls short of the necessary standard to criminalize the action.

With this in mind, the statute's intent element, as it currently stands, can be easily circumvented. If the perpetrator's intent was to "inform or educate" an online community as to the actions of the victim, then it may be possible to raise a defense that the perpetrator didn't intend to act within the scope of cyberstalking. Additionally, similar to what Hunter Moore used

¹³⁰ *Id.*

to do in the case of IsAnyoneUp, the act of posting a “bounty” text that promotes a reward for images of an individual may fall short of the current standard.¹³¹ Other times, the opposite situation occurs. If an individual is in possession of images that are in high demand, such as those of a celebrity, then that person will use their ownership of that nonconsensual pornography to obtain fame, sexual fulfillment, increased web traffic to their own sites or accounts, or even obtain financial compensation.¹³²

This latter possibility echoes the event that sparked headlines during the period of late summer 2014, where hundreds of celebrity photographs were leaked onto image-sharing website (and the so-called “darker corners of the Internet”¹³³) 4chan.¹³⁴ These anonymous leakers sought donations of the cryptocurrency Bitcoin in exchange for the images.¹³⁵ Believed to have originated through a loophole in iCloud, the images quickly gained social media momentum, were given specific hashtags by the Internet community, and individuals were quick to take responsibility for the mass hacking scandal.¹³⁶ With this type of mass violation of privacy, it’s unclear whether or not even an amended version of §2261A would still be applicable. Without codification of the requisite malicious intent inherent in these sorts of crimes, anonymous leaks done for the sole purpose of notoriety would remain uncovered by the statute.

This goes to the question of whether having a subjective intent requirement would be a viable option. Having a subjective approach, however, would also not work. By creating a

¹³¹ Gold, *supra* note 15.

¹³² Franks, *supra* note 119.

¹³³ John D. Sutter, *4chan Founder Defends Online Pranks*, CNN (Feb. 22, 2010), <http://www.cnn.com/2010/TECH/02/22/chris.poole.4chan/>.

¹³⁴ Rob Price, *Bitcoin Beggars Try to Profit Off Leaked Celebrity Nudes*, THE DAILY DOT (Sept. 1, 2014), <http://www.dailydot.com/crime/celebgate-jennifer-lawrence-nude-leakers-bitcoin/>.

¹³⁵ *Id.*

¹³⁶ Fay Strang, *Celebrity 4chan Shock Naked Picture Scandal: Full List Of Star Victims Preyed Upon By Hackers*, MIRROR (Oct. 10, 2014), <http://www.mirror.co.uk/3am/celebrity-news/celebrity-4chan-shock-naked-picture-4395155>.

standard that holds the perpetrator to a standard of “malicious intent” or another comparable term, the problem arises where the statutory terminology creates too narrow a frame with which one can hold another person accountable under the law. Motive doesn’t matter in some instances when a perpetrator of nonconsensual pornography chooses to post an image, and having a specific intent of malice will likely fail to encompass the breadth of situations.¹³⁷

Although this leaves little room for a compromise or solution regarding specific intent language, there are a few ways that the statute could be amended that would begin to rectify, although not entirely fix, §2261A to incorporate instances of nonconsensual pornography. One of the more promising avenues of amendment could include adding language to the statute that would encompass threats to the victim, including indirect threats regarding the perpetrator’s possession of the pornographic material.

The current guideline that the Supreme Court uses to determine threatening language is a “reasonable person” standard, and amending the statute to include threats in addition to intimidation would encompass intended actions, rather than a specific emotional state, that would reasonably frighten and cause distress to the victim. This would be beneficial when looking at how the statute is applied in cases that involve nonconsensual pornography. The current version of the statute, which includes the intent to harass, kill, injure, and intimidate, is already structured so that the intent requirement explains why the perpetrator’s conduct was done initially.¹³⁸ With that existing intent, the perpetrator then engages in conduct that causes substantial emotional distress, which is determined by an objective reasonable person standard. Amending the statute to include the intent to threaten (and thereby engage in conduct that causes substantial emotional

¹³⁷ *Infographic: The Anatomy of an Effective Revenge Porn Law*, END REVENGE PORN (Jan. 23, 2015), <http://www.endrevengeporn.org/anatomy-effective-revenge-porn-law/>.

¹³⁸ 18 U.S.C.A. § 2261A (West 2013).

distress) will work to encompass cases of revenge porn where the perpetrator informs the victim ahead of time their images are at risk for distribution.

Furthermore, incorporating a reasonable person standard for threat could work when the goal is not to “harm” the victim directly, but instead “inform” others about the victim’s sexual history. It could be presumed that an average person would find materials that seek to let others know of a victim’s “sexual propensity” as threatening to one’s livelihood and happiness. These threats would fall under a reasonable person’s interpretation of substantial emotional distress, and therefore be criminal under the cyberstalking statute.

Although publishing details of one’s sexual history may be morally reprehensible, it could be argued that the information remains protected speech if it is factual. While some elements of the speech may enjoy First Amendment protection, there is a change in perspective among certain courts in creating a restriction on the free speech exception for sexually explicit publication of information concerning a private individual.¹³⁹ The Supreme Court has held that “where matters of purely private significance are at issue, First Amendment protections are often less rigorous [...] because restricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest.”¹⁴⁰

Additionally, within the cases of *Osinger* and *Petrovic*, *supra*, the Eighth Circuit Court has begun crafting a series of opinions that protects sexually explicit private information. This directly impacts the victims of revenge pornography. The Eighth Circuit Court has held that

¹³⁹ *Osinger*, 753 F.3d at 948.

¹⁴⁰ *Snyder v. Phelps*, 562 U.S. 443 (2011) (where the Court held that, although matters of purely private significance are of less importance in the context of restricting free speech, the protesters of a military funeral of a homosexual man were speaking to matters of societal concern and had no personal ties to the deceased soldier that would implicate private speech, and therefore their speech was protected by the First Amendment).

without a compelling state interest, it is constitutionally permissible to have the government regulate public disclosure of private facts about an individual.¹⁴¹ This regulation can be implemented through a four-prong test when there is no compelling state interest: (1) the regulation must take a neutral viewpoint, (2) the facts revealed are not already in the public domain, (3) the facts revealed about the private individual are not a legitimate matter of public interest, and (4) the facts revealed are highly offensive.¹⁴² This test has been successfully adopted and implemented within the Eighth Circuit Court. If similar tests are adopted by other jurisdictions and at the federal level, the intent excuse that a perpetrator may have of wishing to “inform” others of the victim’s sexual history would be eliminated.¹⁴³

2. The Need to Redefine “Course of Conduct” in §2266 Provisions for §2261

§2261A effectively circumvents issues that would arise under protected speech claims of the First Amendment by criminalizing *conduct* related to the intent of harassment and intimidation, and not the mere expression of intent to harass or intimidate in and of itself. The current understanding of what determines a “course of conduct” is vague, and in its current state will not protect women from most perpetrators of nonconsensual pornography. While the aforementioned cases involved situations where the defendants had aggressively stalked their victims, both in-person and online, situations may more feasibly arise where a scorned ex-lover simply uploads photos of an individual to a website, similar to what was the norm on websites like IsAnyoneUp and what currently happens on Anon-IB and MyEx.

¹⁴¹ *Petrovic*, 701 F.3d, at 855.

¹⁴² *Id.*, quoting *Coplin v. Fairfield Pub. Access Television Comm.*, 11 F.3d 1395, 1405 (8th Cir. 1997).

¹⁴³ *Id.*

The current definition of “course of conduct” reads: “a pattern of conduct composed of 2 or more acts, evidencing a continuity of purpose.”¹⁴⁴ Because only performing one action, or several acts under one category of action (such as uploading multiple photos to a website or online account), may not be seen as a “course of conduct” in the current definitional sense, the law should be amended to include language that will cast a broader net to encompass a perpetrator’s behavior that does not currently fit into the statutory scheme.

A way to rectify the course of conduct problem is to amend the statute to include a substantial step requirement, and thus expand the scope of the statute include acts that may not, by themselves, be indicative of a “continuity of purpose”. The Model Penal Code casts a broad definition of what a substantial step requires, but acts that strongly corroborate an individual’s criminal purpose may count as a substantial step in several instances.¹⁴⁵ Examples of acts that constitute substantial steps include possession of materials to be used in the commission of the crime, which are specially designed for such illegal use, or can serve no lawful purpose to the perpetrator, given the circumstances.¹⁴⁶ An act constituting a substantial step can also include the possession, collection or fabrication of items to be employed in the commission of the crime, in proximity to the area the crime will take place, if the possession, collection or fabrication of the materials serves no lawful use of the individual under the circumstances.¹⁴⁷

The proposal here is to amend the definition of “course of conduct” to read as follows:
“The term ‘course of conduct’ means a pattern of conduct composed of 2 or more acts evidencing a continuity of purpose, *or one action evidencing a substantial step towards the*

¹⁴⁴ 18 U.S.C.A. § 2266 (West 2014).

¹⁴⁵ MODEL PENAL CODE § 5.01 (2015).

¹⁴⁶ *Id.*

¹⁴⁷ MODEL PENAL CODE § 5.01 (2015).

intended purpose.”¹⁴⁸ This would broaden the statute to include acts that encompass attempt, as well as acts that would serve as a substantial step towards conduct that could cause, attempt to cause, or would be reasonably expected to cause substantial emotional distress to a person. Therefore, when viewed with the intent already covered within part (2) of the statute, the acts of collecting, organizing, editing, and uploading the material would be included within the definition of a “course of conduct.”¹⁴⁹

This differentiation in the definition of “course of conduct” is crucial in situations where the perpetrator of the nonconsensual pornography takes a less-aggressive approach to disseminating the material. In situations where the perpetrator, with the intent to harass an ex-girlfriend, uploads images of her to any number of image-sharing websites where nonconsensual pornography is often found, the steps that he took prior to the click of the “submit” button would be encompassed within the “course of conduct.” Substantial steps with regard to nonconsensual pornography, then, can include several actions. If a victim has asked the perpetrator not to disseminate the pornographic images, and yet he still remains in possession of them and has expressed the intent to distribute the images despite the victim’s request, his preparation of the images for online dissemination may be seen as a substantial step. This could be applied to instances such as those in the case of *Petrovic*, *supra*, where Petrovic threatened that he was holding onto the victim’s pornographic images and would “ruin her life.”¹⁵⁰ Additionally, uploading an individual image could be seen as a substantial step, and a course of conduct could be found when the perpetrator uploads multiple images of a victim to a revenge porn website.

¹⁴⁸ *Id.*

¹⁴⁹ 18 U.S.C.A. § 2261A (West 2013).

¹⁵⁰ *Petrovic*, 701 F.3d, at 852.

This broadened version of the term would also encompass liability for the perpetrator's actions of seeking out the media and preparing it for distribution without the consent of the victim. Not only would having an expanded course of conduct encompass a greater number of instances of the dissemination of nonconsensual pornography, but it could also encompass liability for third-party distributors who are aware that the image was distributed without the knowledge or consent of the victim.¹⁵¹ Creating a liability scheme that would encompass downstream distributors would tackle one of the most pervasive issues with the spread of nonconsensual pornography, and having liability kick in for the crime at the "substantial step" mark would help stop the crime before the images circulate to wider circles of the Internet.

V. CONCLUSION

The proliferation of nonconsensual pornography on the Internet in the modern era is a harmful practice that not only endangers the lives of its victims, but also causes irrevocable harm to their relationships, reputations, and mental state. It is critical that a federal remedy be implemented in order to provide the most beneficial path of legal action possible for victims, as jurisdictional issues and inadequate state law sentences for the crime currently do not protect victims or provide a satisfactory means of prosecution. While an ideal situation would allow for bipartisan support of a statute concerning the criminalization of nonconsensual pornography, the current political climate and concerns over free speech restrictions may not allow Congress to be

¹⁵¹ Telephone Interview with Carrie Goldberg, *supra* note 118 (in which Ms. Goldberg discussed the possible contexts in which attempt liability through a substantial step requirement could potentially be applied in an amended version of § 2261A. Although amending the statute will not rectify all of the issues posed by the act of nonconsensual pornography, creating a way to encompass downstream distribution through third-party actors with knowledge of the material's nonconsensual nature will provide a solution for one of the most common problems with revenge pornography).

amenable to such a law. Utilizing §2261A and expanding upon it through the proposed amendments, however, will be a crucial first step in bringing the problem of nonconsensual pornography to the federal level. While the movement for a federal law specifically targeted at the prosecution of nonconsensual pornography is in the works, making use of §2261A will allow some, albeit not all, cases of revenge porn to enter the federal criminal justice system. By allowing for a foundation of precedent to be set now, a more specifically-targeted federal law may one day arise.

Tie Goes to the Runner: Questionable Calls in the Baltimore Orioles-

Washington Nationals Television Rights Fees Dispute

Stacy Marris ¹

Abstract

This note will discuss the currently ongoing dispute between the Baltimore Orioles, the Washington Nationals and Major League Baseball regarding the Mid-Atlantic Sports Network. This note will expound on the history of the parties involved, and their relationship with each other, the causes of the dispute, and the logistics and details of the conflict itself, including explanations as to broadcast terms and processes pertinent to Major League Baseball, in one, comprehensive paper. This note also discusses possible remedies to the conflict and why they could or could not work. In addition, various repercussions resulting from this dispute and responses to this dispute will be presented. Finally, as this dispute is currently ongoing, it is not possible to compile a completely all-inclusive report of events and occurrences. This note is, however, as comprehensive as was possible at its completion on March 21, 2015.

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Introduction

Though baseball is one of the most popular sports in America, Major League Baseball is first and foremost a business and, more importantly, Major League Baseball is a lucrative business. Philip K. Wrigley, son of William Wrigley, and baseball business figurehead once said, “Baseball is too much of a sport to be called a business, and too much of a business to be called a sport.”² Baseball, the sport, and baseball, the business, are so intertwined, at least from the perspective of owners and executives, that now even the dollar amount of the sport’s entertainment can be calculated, particularly in terms of television broadcast value.

In a question-and-answer luncheon, Andy Meyer, the vice president of development at Tremendous! Entertainment who began his career at ESPN Classic, revealed not only the importance of sports as business, but the importance of televised sports as business. Meyer explained that sports are untouchable in terms of their lucrativeness, especially in the television industry: sports are communal and viewing them is a communal activity—the majority of viewers will not watch sports when they are not live, and that watching a game after it is live is like missing out on a joke that everyone else is in on.³ This is why baseball teams being able to market and sell the television rights fees for their games is so important; live broadcasting of their games makes a lot of money.

Because of the television rights fees market for Major League Baseball games, the average Major League Baseball team is worth \$811 million, which is up over \$700 million dollars just twenty-two years ago.⁴ In 2014, five teams, the New York Yankees, the Los Angeles

² J.C. BRADBURY, *THE BASEBALL ECONOMIST: THE REAL GAME EXPOSED* 82 (2008).

³ Interview with Andy Meyer, Vice President of Development, Tremendous! Entertainment, in N.Y.C., N.Y. (Jan. 5, 2014).

⁴ Mike Ozanian, *Baseball Team Values 2014 Led By New York Yankees at \$2.5 Billion*, FORBES (March 26, 2014, 9:54 AM), <http://www.forbes.com/sites/mikeozanian/2014/03/26/baseball-team-values-2014-led-by-new-york-yankees-at-2-5-billion/>.

Dodgers, the Boston Red Sox, the Chicago Cubs and the San Francisco Giants,⁵ made history signing television rights deals with regional sports networks, making each team worth over \$1 billion.⁶ Following the old adage, that money is the root of all evil, it is this selling of rights fees that is at the root of the dispute between the Baltimore Orioles and the Washington Nationals (the Baltimore Orioles come in at number 16 out of 30 on a Forbes 2014 Baseball valuations list, with a current value of \$620 million and the Washington Nationals are ranked number 13, worth \$700 million).⁷

I. Providing the Background for the Dispute

A. A Brief History of Baseball in the Mid-Atlantic Region

There is a rich history of baseball throughout the country and the Mid-Atlantic Region is no different, particularly in the Baltimore-Washington Metropolitan area. The cities are less than forty miles apart. Thus the cities are accustomed to the sharing of culture, of cuisine, of competitive sports teams.

Though baseball teams have long occupied Baltimore (the city which would give Babe Ruth his start), a Major League Baseball team has called Baltimore, Maryland home only since the 1954 season.⁸ The entirety of Major League Baseball approved the move of the St. Louis Browns to Baltimore on September 28, 1953.⁹ This was following a season in which the Browns won 54 games, lost 100 games and only had a crowd of about 3,000 fans in the last game of the

⁵ *MLB Valuations 2014*, FORBES, <http://www.forbes.com/pictures/mlm45fdgdd/1-new-york-yankees-8/> (last visited January 5, 2014).

⁶ Ozanian, *supra* note 4.

⁷ *MLB Valuations 2014*, *supra* note 5.

⁸ *Orioles Timeline*, THE BALTIMORE ORIOLES (2014), <http://baltimore.orioles.mlb.com/bal/history/timeline.jsp>.

⁹ *Orioles Timeline*, *supra* note 8.

season.¹⁰ Though the Orioles did not take the Majors by storm, a little over a decade later the team won its first World Series.¹¹ The lucky streak would continue for the next three decades with just one poor season in 1988.¹² In 1992, Camden Yards, recognized as one of the most beautiful stadiums in Major League Baseball, was built.¹³

Washington, D.C.'s baseball history starts 72 years earlier: over twelve baseball teams have called Washington home since the first organization, the Washington Olympics, played there in 1872.¹⁴ The Olympics helped found one of the first professional baseball leagues in the United States.¹⁵ Following 1872, Washington, D.C. was a continuous host for a professional, or the equivalent of "Major League," baseball team, from 1901 to 1971.¹⁶ The Washington Senators were such a beloved team that the successful Broadway musical *Damn Yankees*, from 1955, featured the organization prominently.¹⁷ The Washington team was officially recognized as the Nationals until 1956, though many referred to the team as the Senators. In 1961, this team became the Minnesota Twins and an expansion team, officially named the Senators, immediately started playing in the city.¹⁸ In 1971, Washington, D.C. would say goodbye to professional baseball, as the Senators moved south to become the Texas Rangers.¹⁹ It was not until 2005 that a Major League team returned to Washington, D.C.²⁰ The Major League Baseball Association moved a faltering Montreal Expos to the area and renamed the team the Nationals.²¹

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ Frederic J. Frommer, *YOU GOTTA HAVE HEART: A HISTORY OF WASHINGTON BASEBALL FROM 1859 TO THE 2012 NATIONAL LEAGUE EAST CHAMPIONS* (2013).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Frommer, *supra* note 14.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

B. Explaining Television Rights Fees

Television rights fees relate to broadcasting, which is defined in the legal world as “a verb, to transmit programs or signals intended to be received by the public through radio, television, or similar means. As a noun, the radio, television, or other program received by the public through transmission.”²² Therefore, television rights fees arise when companies or organizations pay for this broadcasting, which is a “key income stream” in the sports world.²³ In fact, media rights sales have actually overtaken the profits gained by ticket sales for live performances.²⁴ These sales have also helped increase profits in other revenue streams, including advertising, corporate sponsorship deals and naming rights.²⁵ Relating to Major League Baseball specifically, major profits from television rights fees is a relatively new idea; during the 1950s and 1960s, “modest local and national rights fees became the norm,” with major national networks, specifically NBC emerging as primary broadcasters.²⁶

Entering the 1980s, the cable age of television, many sports teams began creating their own regional networks to broadcast their games. The Boston Red Sox led the way throughout the 1980s and 1990s, raising rights fees with “an ownership stake in its local flagship, the New England Sports Network” or NESN.²⁷ In 2002, the New York Yankees became the leader in rights fees revenue.²⁸ With Goldman Sachs acting as the team’s biggest backer, the team created

²² *Broadcasting*, THE FREE DICTIONARY, <http://legal-dictionary.thefreedictionary.com/Television+rights> (last visited November 28, 2014).

²³ Rafael Ferraz Vazquez, *Sport and Broadcasting Rights: Adding Value*, WIPO MAGAZINE (April 2013), http://www.wipo.int/wipo_magazine/en/2013/02/article_0005.html.

²⁴ *Id.*

²⁵ *Id.*

²⁶ Tom Van Riper, *The New Moneyball*, FORBES (March 21, 2014, 6:00 PM), <http://www.forbes.com/forbes/2012/0409/baseball-valuations-12-mccourt-multibillion-dollar-deals-new-moneyball.html>.

²⁷ *Id.*

²⁸ *Id.*

its own network, the Yankees Entertainment & Sports Network.²⁹ YES Network has continued to be one of the most successful regional sports networks.

Though it may seem somewhat complicated, Matthew Perez at the *Camden Depot* blog has broken down how regional sports networks function and how they provide revenue for baseball teams. It begins with a team selling their media rights, in this case it is their television rights as described above, to a regional sports network for an agreed upon total amount.³⁰ This sum can be renegotiated from year to year, and this sum is what is called a “media rights fee,” or in the present case, a “television rights fee.”³¹

After the regional sports network has acquired the television rights from the regional team or teams, the network then is able to broadcast the games themselves.³² Furthermore, the network can now attract advertisers because of the content they have acquired, leading to a new source of revenue: the advertising fee.³³ The network also approaches cable and satellite providers (such as Comcast, Time Warner Cable, DirecTV and Dish) with their own television rights.³⁴ These cable and satellite providers are then able to purchase the regional network’s television rights in a certain area for what is called a “subscriber fee.”³⁵ This is a monthly fee, which the providers will then pay to the network for every subscriber of their cable or satellite package that wishes to view the network.³⁶ In order for the cable and satellite providers to make

²⁹ *Id.*

³⁰ Matt Perez, *What We Know About MASN*, CAMDEN DEPOT (Feb. 20, 2014), <http://camdendepot.blogspot.com/2014/02/what-we-know-about-masn.html>.

³¹ *Id.*

³² *What We Know About MASN*, *supra* note 30.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

a profit, the companies charge each subscriber slightly more for the regional sports network than what they pay to the network for each viewer.³⁷

A regional sports network's profits therefore come largely from subscriber and advertising fees.³⁸ The profit earned is then used first to pay the network's operational expenses and the television rights fees owed to the team or teams.³⁹ If money remains after all fees and expenses have been paid, that additional revenue is returned to the owners of the networks, who are in many cases the team or teams selling their television rights to the network.⁴⁰ This return in revenue is what is called an "equity stake payment."⁴¹ The equity stake payment is proportional to the percentage of the network the owner possesses.⁴² The money earned from these media rights fees and equity stake payments is what allows many teams to spend more money than they have in the past without these regional sports networks.⁴³ This is the new business of baseball.

Forbes has recently published articles reflecting on this "new business of baseball," focusing on four teams: the Houston Astros, the Los Angeles Angels, the San Diego Padres and the Texas Rangers.⁴⁴ These teams have all signed television network contracts worth \$1 billion-plus in rights fees.⁴⁵ The total of all four of these contracts combined is over \$10.1 billion, in equity, and over \$6 billion, in rights fees.⁴⁶ The Texas Rangers has the largest and most lucrative

³⁷ *What We Know About MASN*, *supra* note 30.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *What We Know About MASN*, *supra* note 30.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Christina Settimi, *MLB's Most Valuable Television Deals*, FORBES (March 26, 2014, 10:01 AM), <http://www.forbes.com/sites/christinasettimi/2014/03/26/mlbs-most-valuable-television-deals/>.

⁴⁵ *Id.*

⁴⁶ *Id.*

deal, which is a twenty-year contract with Fox Sports Southwest.⁴⁷ This deal sees \$85 million in rights fees per year being turned over.⁴⁸

This is history-making for not just Major League Baseball, but professional sports as a whole: teams no longer have to rely so heavily on on-site ticket sales or national broadcasting. This is because a team owning their own regional network also leads to more lucrative deals in terms of rights fees. For example, the Houston Astros has joined forces with the Houston Rockets to create a network in conjunction with Comcast.⁴⁹ The baseball team owns a little less than half the network and is still expected to earn \$80 million per year in rights fees.⁵⁰

Therefore, it was not out of the ordinary for the Baltimore Orioles and the Washington Nationals to join forces in order to create their own regional sports network in 2007: the Mid-Atlantic Sports Network, or MASN.⁵¹ In MASN's first year of broadcasting, the network had a 5% profit margin.⁵² Since that time, the network has had a 20% profit margin, which is normal for the business, according to the Bortz Media & Sports Group (Bortz), a company who offers valuation services of cable systems and methodologies to calculate such values.⁵³ However, what is out of the ordinary is the dispute over television rights fees, which has emerged between the two teams over the course of the last few years.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Van Riper, *supra* note 26.

⁵⁰ *Id.*

⁵¹ Mark Brown, *Orioles-Nationals MASN dispute: The case that Major League Baseball has cheated the Orioles*, SB NATION CAMDEN CHAT (Aug. 8, 2014), <http://www.camdenchat.com/2014/8/8/5981507/orioles-nationals-masn-dispute-rights-fees-arbitration-court>.

⁵² *Id.*

⁵³ *Id.*

II. The Mid-Atlantic Sports Network

A. The Original Deal

Because Major League Baseball was arranging the Montreal Expos' move to Washington, D.C. to become the Washington Nationals, the league created a deal with the Baltimore Orioles, giving them financial perks in exchange for making the move problem-free for Baseball: including "the ability to take in the lion's share of the region's television revenues."⁵⁴ This is because, before the Expos even moved to Washington to become the Nationals, and Major League Baseball and the Orioles were in talks for that to happen, it was estimated that Washington D.C. area provided the Orioles with 30% of their fans, sponsors and profits.⁵⁵ It was further estimated that this move, this loss of 30% of Orioles fans, sponsors and profits, would result in a loss of about \$40 to \$50 million per year, which would only be a larger amount nearly a decade later (the deal was made in 2005).⁵⁶ Thus, Major League Baseball and the Orioles reached a deal where the Orioles would own the majority of a regional sports network, which then would buy both teams' television rights.⁵⁷

In the original deal from 2005, MASN would control the television rights fees for the Nationals' organization until 2012.⁵⁸ At that time, the fees "would be adjusted to 'fair market value.'"⁵⁹ Following this readjustment, the Orioles would receive "the same amount of fees as whatever the Nationals would receive in any agreement."⁶⁰

⁵⁴ Brown, *supra* note 51.

⁵⁵ Matt Perez, *An Update to the MASN Situation*, CAMDEN DEPOT (Aug. 25, 2014), <http://camdendepot.blogspot.com/2014/08/an-update-to-masn-situation.html>.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Brown, *supra* note 51.

⁵⁹ *Id.*

⁶⁰ *Id.*

In facilitating the Expos' move to Washington, the League arranged a deal with the Orioles, which converted the Orioles Television Network into the larger MASN and said that the Orioles would buy the Nationals' television rights.⁶¹ This contract had no termination date.⁶² The Orioles would also get the majority of MASN, with an equity stake at 90% and the Nationals possessing just 10%.⁶³ After two years, presumably due to a "startup period,"⁶⁴ the Nationals' stake would increase by 1% until they possessed 33%.⁶⁵

As previously mentioned, equity stake payments are based on the percentage of the network which the owner possesses.⁶⁶ In the year 2012, the Nationals were paid just under \$8 million in an equity stake payment.⁶⁷ That same year, the Orioles were said to have an 86% equity stake in MASN and so would have received approximately \$50 million in payment.⁶⁸ Following, the Nationals would receive a return of about \$12 million in 2016, while the Orioles, with a remaining stake in MASN of 17% would probably receive an average of about \$57.4 million.⁶⁹

As described, according to the deal, the Orioles were also to be paid the same rights fees by MASN as the Nationals, being revisited once every five years, beginning in 2012.⁷⁰ It is assumed that both the Orioles and the Nationals were paid \$20 million in rights fees during the

⁶¹ James Wagner, *Washington Nationals, Baltimore Orioles split over MASN cable TV rights fee*, THE WASHINGTON POST (Aug. 14, 2012), http://www.washingtonpost.com/sports/nationals/washington-nationals-baltimore-orioles-split-over-masn-cable-tv-rights-fee/2012/08/14/2e91845e-d810-11e1-b8ce-16e9caa8b86a_story_1.html.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *What We Know About MASN*, *supra* note 30.

⁶⁵ *Washington Nationals, Baltimore Orioles split over MASN cable TV rights fee*, *supra* note 61.

⁶⁶ *What We Know About MASN*, *supra* note 30.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Washington Nationals, Baltimore Orioles split over MASN cable TV rights fee*, *supra* note 61.

first two years of the deal.⁷¹ This amount, as provided in the agreement, was raised approximately \$1 million annually, until it reached \$29 million in the year 2011.⁷²

For a benchmark, in 2008, MASN's rights fee was \$26 million to the Orioles and to the Nationals. Further, each team would receive \$29 million in 2011, and by using the Bortz formula, as prescribed by the original contract, each team would receive \$34 million in 2012 and this would increase to around \$46 million in 2016.⁷³ This original deal between the Washington Nationals and the Baltimore Orioles is not out of the ordinary in the industry. In fact, the deal resembles other media deals, like those possessed by the Philadelphia Phillies, the Houston Astros and the Texas Rangers, the Los Angeles Angels of Anaheim and the Los Angeles Dodgers, and the San Diego Padres.⁷⁴

In short, MASN has “a similar but less lucrative media market to most of the other teams listed... but the amount they are paying the Nationals and the Orioles from 2016-2031 is projected to be slightly larger than the amount that the Phillies and Astros are receiving from their deals and considerably larger than the amount that the Padres are receiving.”⁷⁵

B. The Conflict: the 2012 Renegotiation

The conflict at present arose when it came time to renegotiate the payments between the Orioles and the Nationals as provided by the original contract. However, the League never planned for the deal to last as long as it has, which is over nine years.⁷⁶ In fact, the League

⁷¹ *What We Know About MASN*, *supra* note 30.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Matt Perez, *Comparing The Nationals/Orioles Media Deal To Other Teams' Media Deals*, CAMDEN DEPOT (Mar. 4, 2014), <http://camdendepot.blogspot.com/2014/03/comparing-nationalsorioles-media-deal.html>.

⁷⁵ *Id.*

⁷⁶ Brown, *supra* note 51.

emphasized to potential buyers of the Nationals that the “television revenue would be redistributed in spite of the prior agreement with the Orioles.”⁷⁷ The conflict began during the process of determining the current market value, which is where MASN had enlisted the services of Bortz, which is standard practice for such determinations in the industry and Major League Baseball in particular.⁷⁸

In 2012, MASN put an increased rights fee of \$34 million on the table, which would then increase by 7.7% each year. If this proposal were accepted, the fee would be at \$40 million in 2014.⁷⁹ However, the Nationals objected, saying the franchise should be receiving \$100 to \$120 million in rights fees.⁸⁰

To break down the two sides of the dispute, there is MASN and there is the Nationals. MASN’s position was to continue paying the Nationals and the Orioles their television rights fees based on what was provided in the original deal.⁸¹ MASN argued that the Bortz formula should be used to calculate the television rights fees: it has been used for nearly twenty years by Major League Baseball to calculate fair market value for media deals for their teams.⁸² Thus, it was logical that MASN would want to pay based on what the Bortz methodology provides, approximately \$40 million.⁸³

However the Nationals wished to be paid fair market value at that time even though that was not what was provided by the original deal between the Nationals, the Orioles and Major League Baseball. The Nationals argued that they should be receiving media rights fees similar to

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Matt Perez, *Explaining the Nationals/MASN Dispute*, CAMDEN DEPOT (Mar. 11, 2014), <http://camdendepot.blogspot.com/2014/03/explaining-nationalsmasn-dispute.html>.

⁸² *Id.*

⁸³ *Explaining the Nationals/MASN Dispute*, *supra* note 81.

what other large market baseball teams were being paid: how they arrived at the \$100 million to \$120 million number,⁸⁴ which would pay the Nationals at least \$20 million more than the New York Yankees.⁸⁵ This urgency is due to the fact that, as of 2016, large market clubs will not be able to obtain money from the league's revenue sharing pool.⁸⁶ The Nationals argued that since the Orioles would still be eligible for such subsidies following 2016, the Nationals should be able to receive more money at that time, so as not to leave valuable dollars in the ether.⁸⁷

When Major League Baseball was presented with this conflict in 2012, it was put in an extremely difficult bind: a team would have reasonable cause for a lawsuit no matter what decision it made.⁸⁸ MASN would have a legitimate cause for a lawsuit if Major League Baseball decided for the Nationals because it would violate the terms of the original deal as it would not be using the Bortz methodology to calculate fair market value.⁸⁹ If Major League Baseball sided with MASN and the Orioles, the Nationals would also have had potential cause for a lawsuit, as they would not receive fair television rights fees based on comparable markets and what those teams were paid.⁹⁰ Ultimately, it is this dispute which led the teams to the Revenue Sharing Definitions Committee (RSDC) in June 2014,⁹¹ as a clause in the contract stated if the parties could not resolve their renegotiations, then the value should be calculated by the Committee.⁹²

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Explaining the Nationals/MASN Dispute*, *supra* note 81.

⁸⁹ *Id.*

⁹⁰ *Explaining the Nationals/MASN Dispute*, *supra* note 81.

⁹¹ Brown, *supra* note 51.

⁹² *An Update to the MASN Situation*, *supra* note 55.

C. The Improper Action of Major League Baseball's RSDC: Ruling in favor of the Washington Nationals

The Bortz organization has set the value of “any disputed television contract for the last decade and a half.”⁹³ Per the agreement, baseball’s RSDC is required to use the methodology in negotiating any rulings.⁹⁴ The RSDC is a group created to arbitrate revenue disputes between any two teams in Major League Baseball. The RSDC in the dispute between the Nationals and the Orioles consisted of one representative from the Tampa Bay Rays, the Pittsburgh Pirates and the New York Mets franchises.⁹⁵ Even though the RSDC was supposed to be using the Bortz methodology, as they were required, and which MASN had already done, the Committee ruled in favor of the Nationals.⁹⁶ Per the agreement, this is improper. In fact, the managing director of Bortz, Mark Wyche,⁹⁷ explained in an affidavit that the RSDC “improperly ignored the facts and intentionally ignored other applicable reports that applied the established methodology” to rule in favor of the Nationals.⁹⁸

Wyche continues to say that according to the Bortz methodology, the Nationals were only worth \$119 million in television rights fees over the 2005 to 2011 period, while the Nationals claimed they were worth much more.⁹⁹ In reality, the Nationals received \$16 million dollars more over the course of that six-year period, so according to the methodology the Nationals were actually paid in excess of what they were worth.¹⁰⁰

⁹³ Brown, *supra* note 51.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *An Update to the MASN Situation*, *supra* note 55.

⁹⁸ Brown, *supra* note 51.

⁹⁹ *An Update to the MASN Situation*, *supra* note 55.

¹⁰⁰ *Id.*

The support for the Nationals comes from what appears to be fair market value for the Los Angeles Dodgers, as well as a few other teams the Nationals deemed comparable.¹⁰¹ In an affidavit from economist Hal Singer, he explains that the RSDC rejected the number asked for by the Nationals, as MASN would never agree to paying a price which could bankrupt the network.¹⁰² Furthermore, the Committee rejected this proposed value, as the Nationals did not actually have access to the numbers they used to calculate the fair market values in the other regions, instead using a formula of projections and inflation.¹⁰³

The same affidavit also describes the RSDC rejecting the Bortz methodology to determine the price as well.¹⁰⁴ The Committee claimed MASN's offer, like the Nationals', was "results-oriented rather than realistic."¹⁰⁵ Ultimately, it appears the Committee reached the number of approximately \$300 million over five years, being paid to both teams.¹⁰⁶

Though this number is closer to MASN's position than the Nationals',¹⁰⁷ this translates into MASN having to pay "between \$60-90 million in additional rights fees to the Nationals per year."¹⁰⁸ However, there is evidence that the RSDC "joked the numbers," or used questionable calculations, to rule more in the Nationals' favor: it considered baseline numbers from 2007.¹⁰⁹ As mentioned, this year was the first year that MASN existed, and these numbers are not an example of how MASN has performed since and does not reflect its current popularity.¹¹⁰

Economist Singer supports this idea, explaining that from 2008 to 2011, MASN actually had

¹⁰¹ Matt Perez, *The Reason Why the Nationals Asked for \$590 Million*, CAMDEN DEPOT (Oct. 8, 2014), <http://camdendepot.blogspot.com/2014/10/the-reason-why-nationals-asked-for-590.html>.

¹⁰² *An Update to the MASN Situation*, *supra* note 55.

¹⁰³ *The Reason Why the Nationals Asked for \$590 Million*, *supra* note 101.

¹⁰⁴ *An Update to the MASN Situation*, *supra* note 55.

¹⁰⁵ *The Reason Why the Nationals Asked for \$590 Million*, *supra* note 101.

¹⁰⁶ *An Update to the MASN Situation*, *supra* note 55.

¹⁰⁷ *The Reason Why the Nationals Asked for \$590 Million*, *supra* note 101.

¹⁰⁸ Brown, *supra* note 51.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

what are considered to be profit margins standard for the industry and the 2007 numbers exist because MASN was having difficulties reaching agreements with cable and satellite providers.¹¹¹ Nevertheless, the RSDC used MASN's less than 10% profit margin from its first operating year to rule this was reasonable for MASN going forward, though Bortz suggested a 20% profit margin. It was "expressly bound in the Settlement Agreement to use the Bortz methodology."¹¹²

Major League Baseball tried to support this ruling by looking to fair market values in comparable markets.¹¹³ This is strange, as the RSDC explained in a 2005 report that preference should be given to the Bortz Methodology in such calculations, as no market can truly be likened to another.¹¹⁴ The RSDC report reads: the "'Bortz analysis' avoids the examination of 'comparable' arm's-length contracts and instead collects estimated or actual revenue and expense data from the related broadcasting entity, assumes a market-driven operating margin that should satisfy the broadcasting entity and then calculates back to a rights fee that should be available to the club."¹¹⁵

Sportswriter Matt Perez breaks the Bortz methodology down into a simple step-by-step process: "[1] Determine total revenue. [2] Determine total expenses other than rights fees. [3] Subtract expenses from revenue. This number is called disposable revenue. [4] Determine 'Bortz' Operating Margin. This percentage is determined by the RSDC and has never before been less than 20%. [5] Multiply Revenue by Bortz Operating Margin. This is the amount of [local sports television network] profit. [6] Subtract Disposable Revenue by [local sports television network] profit. This is the net rights fee per contract."¹¹⁶ This is the methodology,

¹¹¹ *An Update to the MASN Situation*, *supra* note 55.

¹¹² Brown, *supra* note 51.

¹¹³ *An Update to the MASN Situation*, *supra* note 55.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

which should have been used in the RSDC's decision-making; this was the methodology which had been used in 19 other similar disputes.¹¹⁷ In these other cases, as stated previously, the operating margin had never been less than 20%, where in this dispute, it was just 8%.¹¹⁸

Despite all this, the RSDC decided to forego the Bortz methodology in making their decision favoring the Nationals. This decision, including determining MASN's operating margin to be just 8%, will result in the Orioles losing hundreds of millions of dollars, potentially a billion dollars.¹¹⁹ This questionable ruling has led the Orioles to file a petition in New York Supreme Court for an injunction.¹²⁰ Chadbourne & Parke LLP, a New York law firm, represents MASN, with Thomas J. Hall, a co-head of the law firm's litigation practice, as the lead attorney on this specific petition.¹²¹

III. Legal Proceedings

A. The New York Supreme Court

The petitioner in the case between the Baltimore Orioles and the Washington Nationals is not the Orioles team itself. Instead, the petitioner is TCR Sports Broadcasting Holding, LLP, which works as MASN.¹²² The Baltimore Orioles team does however, have a large stake in MASN. The Baltimore Orioles, or the Baltimore Orioles Limited Partnership, owns 85% of the network.¹²³ Therefore, Peter Angelos, the Orioles majority partner, or owner, plays a very large

¹¹⁷ *An Update to the MASN Situation*, *supra* note 55.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Brown, *supra* note 51.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

role at the network as well.¹²⁴ Though Angelos and the Orioles are not the actual plaintiffs in this case, in reality they are heavily intertwined with it.

MASN's petition explains that they believe the arbitration panel acted "outside the scope of its authority granted in the Settlement Agreement."¹²⁵ The Settlement Agreement refers to the original deal the Orioles, the Nationals and Major League Baseball agreed upon when the Nationals originally moved to Washington in 2005.¹²⁶ MASN also alleges that the Panel was "impossibly tainted by a conflict of interest. An increase in the rights fees for the Orioles and Nationals means that more money goes into the revenue sharing pool."¹²⁷ The revenue sharing pool is like a communal source of revenue for baseball teams: "baseball collects 34% of local television revenues as tax to put in the revenue sharing pool. Profits from an ownership stake in a network—which the Orioles have enjoyed explicitly as a compensation for losing sole access to their territory—are not taxed this way."¹²⁸ Furthermore, the Tampa Bay Rays and the Pittsburgh Pirates are both teams who benefit from the revenue-sharing money, and both were teams who had representatives on the RSDC.¹²⁹

Additionally, the petition argues that the Major League Baseball Organization has a financial stake in the outcome of the arbitration: it had itself provided money to the Washington Nationals, through a third-party loan, in 2012 and 2013.¹³⁰ This was done "in advance of an expected windfall when the arbitration case was handed down."¹³¹ In other words, Major League

¹²⁴ Brown, *supra* note 51.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Brown, *supra* note 51.

¹³⁰ *Id.*

¹³¹ Brown, *supra* note 51.

Baseball, who organized the RSDC, and two out of the three Committee members, were benefactors of an award in favor of the Washington Nationals.¹³²

Essentially, MASN sued on the claim that the court should vacate the arbitration award decided by the RSDC, as it was riddled with “abuses and deficiencies.”¹³³ On August 18, 2014, a New York judge believed that the arguments in MASN’s petition were strong enough to “issue a temporary restraining order against either Baseball or the Nationals doing anything to enforce the award from this arbitration panel.”¹³⁴ This injunction included stopping the Major League Baseball from forcing a payment of about \$20 million from MASN and also included stopping the Nationals from pulling any of their games from MASN.¹³⁵ This is because the Nationals had been urging Alan “Bud” Selig to declare the Orioles “in default for payments they were supposed to make according to this biased arbitration panel.”¹³⁶

B. Between the Injunction and the Hearing

In September 2014, MASN and the Orioles organization asked the New York Court to throw out the RSDC decision.¹³⁷ In October 2014, Major League Baseball and the Nationals filed petitions asking the court to uphold the decision.¹³⁸

¹³² *Id.*

¹³³ *Rob Manfred predicts peace in O’s, Nats TV war*, USA TODAY (Feb. 4, 2015), <http://www.usatoday.com/story/sports/mlb/2015/02/04/manfred-predicts-resolution-in-orioles-nationals-tv-dispute/22890743/>.

¹³⁴ Brown, *supra* note 51.

¹³⁵ *An Update to the MASN Situation*, *supra* note 55.

¹³⁶ Brown, *supra* note 51.

¹³⁷ James Wagner, *MLB, Nationals ask court to uphold panel’s TV rights ruling in MASN dispute*, THE WASHINGTON POST (Oct. 21, 2014), <http://www.washingtonpost.com/blogs/nationals-journal/wp/2014/10/21/mlb-nationals-ask-court-to-uphold-panels-tv-rights-ruling-in-masn-dispute/>.

¹³⁸ *Id.*

In its petition to the New York Supreme Court, MASN and the Baltimore Orioles cite 9 USC §§ 10(a)(1), (2), (3), (4) and CPLR §§ 7511(b)(1)(ii) and (iii).¹³⁹ Section 10 of the United States Code explains vacating awards of arbitration are appropriate: where the award was procured by fraud; where there was evident partiality; where the arbitrators were guilty of refusing to hear evidence pertinent to the controversy; and where the arbitrators exceeded their powers.¹⁴⁰ The New York Code also explains when vacating an award granted by arbitration is appropriate in § 7511: if the court finds the rights of that party were prejudiced by corruption, fraud or misconduct in procuring the award or when an arbitrator or person making the award exceeds his power.¹⁴¹

C. The New York Supreme Court Hearing

Following the injunction, the two parties convened on December 15, 2014 in order to determine whether the RSDC's award should be thrown out and recalculated per the Settlement Agreement.¹⁴² Instead however, Judge Lawrence Marks granted MASN's demand for partial discovery, which will delay the actual hearing.¹⁴³ After three hours of debate, it was decided that Major League Baseball must turn over to MASN documents detailing incoming commissioner Rob Manfred's involvement with the RSDC.¹⁴⁴ In addition, the League must turn over documents about the RSDC's "meetings, attendance and the details of correspondence between

¹³⁹ Petition to Vacate Arbitration Award at 6-7, *TCR Sports Broad. Holding, LLP v. WN Partner, LLC*, No. 652044/14 (N.Y. App. Div. 2014), <http://www.scribd.com/doc/236167423/Petition>.

¹⁴⁰ 9 U.S.C.A. § 10(a)(1), (2), (3), (4) (West 2002).

¹⁴¹ N.Y. C.P.L.R. 7511 (McKinney).

¹⁴² James Wagner, *NY judge grants MASN discovery in dispute with MLB, Nationals*, THE WASHINGTON POST (Dec. 15, 2014), <http://www.washingtonpost.com/blogs/nationals-journal/wp/2014/12/15/ny-judge-grants-masn-partial-discovery-in-dispute-with-mlb-nationals/>.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

Manfred and [Major League Baseball] staff” and the RSDC.¹⁴⁵ MASN however, was careful not to demand information regarding the actual arbitration process, as case law has generally prohibited it.¹⁴⁶ MASN simply wants information, which would support its claim that there was evident partiality by the arbitrators during the arbitration process.¹⁴⁷

MASN, through attorney Arnold Weiner, continues to argue that Manfred, “who has been serving as Commissioner Bud Selig’s right-hand man,” and Major League Baseball have a monetary interest in the RSDC’s decision.¹⁴⁸ This decision of course, awarded the Nationals “nearly \$300 million in TV rights fees during the 2012-2016 reset period.”¹⁴⁹

Following the injunction win, this grant for discovery marks “another minor victory” for MASN.¹⁵⁰ Especially so, as the Orioles contend that the RSDC arbitration was “also tainted because [Major League Baseball] gave the Nationals \$25 million in a so-called secret deal” and also because, interestingly, Major League Baseball, “the Nationals and the arbitrators all used the same law firm and [did not] disclose it.”¹⁵¹

The brief MASN submitted to obtain this grant for discovery explains the situation: “Mr. Manfred—a Proskauer [Rose,] [the firm representing the Nationals in the dispute as well] client, both individual and as [a Major League Baseball] executive – asserts that his staff provided legal advice to the RSDC and drafts its Award. Through this intimate involvement with Proskauer [Rose] and the RSDC, they had every opportunity to subvert the process. And they had every

¹⁴⁵ *Id.*

¹⁴⁶ Garrett Hooe, The Nationals, MLB, Orioles, and MASN: Litigation know no offseason, SB NATION FEDERAL BASEBALL (Jan. 7, 2015), <http://www.federalbaseball.com/2015/1/7/7506545/nationals-mlb-orioles-masn-litigation-rights-fees-dispute-knows-no-offseason>.

¹⁴⁷ *Id.*

¹⁴⁸ *NY judge grants MASN discovery in dispute with MLB*, *supra* note 142.

¹⁴⁹ *Id.*

¹⁵⁰ *NY judge grants MASN discovery in dispute with MLB*, *supra* note 142.

¹⁵¹ *Id.*

incentive to, as well, supplied by a nearly \$25 million loan [Major League Baseball] made to the Nationals.”¹⁵²

Though there is no deadline for the turnover of the documents requested, two weeks has been a suggested time for other documents.¹⁵³ The Nationals and the law firm mentioned by MASN as unlawfully representing clients have both turned over the documents requested, however Major League Baseball refused to do so without a court order.¹⁵⁴ As mentioned, Marks granted this order, as he believes that the \$25 million loan to the Nationals shows that Major League Baseball clearly had a “vested interest in the panel’s ruling.”¹⁵⁵ It is possible that more information about the dispute will be clarified on January 8, 2015, when there is a conference between the two parties scheduled, with reply briefs due January 12, 2015.¹⁵⁶ Ultimately however, the hearing is scheduled for March 2, 2015 to determine whether the Orioles’ accusations are true and whether a new award will be negotiated.¹⁵⁷ This March 2, 2015 merits hearing will ultimately be the first major proceeding in the dispute, and though it is extremely difficult to get an arbitration decision overturned, it is not out of the question for the Court to decide in such a way. Until that time the two sides have to sift through many turned-over documents.¹⁵⁸ (Further, as of March 21, 2015, there has been nothing published, or at least made available, regarding the March 2, 2015 hearing.)

¹⁵² Hooe, *supra* note 146.

¹⁵³ *NY judge grants MASN discovery in dispute with MLB*, *supra* note 142.

¹⁵⁴ *Id.*

¹⁵⁵ *NY judge grants MASN discovery in dispute with MLB*, *supra* note 142.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ Hooe, *supra* note 146.

D. Discovery Developments

Following the grant for discovery, several new developments came to light in January 2015. The documents submitted to the court revealed that there were several offers made by both MASN and Major League Baseball, though none successful.¹⁵⁹ MASN offered to Major League Baseball, it was revealed, to increase the Nationals profits interest to 33% from 2014 to 2016 if the Bortz methodology was used to calculate the television rights fees.¹⁶⁰ This offer however, would completely do away with anything the RSDC has said up to this point.¹⁶¹

Major League Baseball conditioned this offer, potentially agreeing to it if MASN paid Major League Baseball back for the \$25 million loan it gave to the Nationals and made the 33% equity stake effective immediately.¹⁶² As a result, the deal was not successful and further, the Nationals opposed this deal as it would have provided the Orioles with about \$80 million more than the RSDC ruling.¹⁶³ This does however, demonstrate to the court that MASN was willing to compromise with Major League Baseball and the Nationals and not continue legal action.¹⁶⁴

The documents also reveal that Major League Baseball tried to get Angelos to restructure how MASN is run or even sell MASN to Comcast.¹⁶⁵ In restructuring MASN, Major League Baseball offered \$44 million in television rights fees to each team if the Orioles would split equity of MASN, 50-50.¹⁶⁶ If the Orioles agreed, then Major League Baseball would increase the television rights fees by 4% after that, which it said was fair market value.¹⁶⁷ Though the Orioles

¹⁵⁹ Matt Perez, *Two New Developments in the MASN Dispute*, CAMDEN DEPOT (Jan. 28, 2015), <http://camdendepot.blogspot.com/2015/01/two-new-developments-in-masn-dispute.html>.

¹⁶⁰ *Id.*

¹⁶¹ *Two New Developments in the MASN Dispute*, *supra* note 159.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Two New Developments in the MASN Dispute*, *supra* note 159.

¹⁶⁷ *Id.*

would receive no less extra money than agreeing to the RSDC's decision, this deal would cause a serious loss in ownership of MASN, and the revenue which would come from it, which is probably why this deal was not successful either.¹⁶⁸

Furthermore, Major League Baseball tried to convince Angelos to sell MASN to Comcast.¹⁶⁹ In this plan: the Orioles would hand over 23.5% equity of MASN to the Nationals in 2013 and sell 30% of the network to Comcast for a total of \$216 million that same year.¹⁷⁰ Then Comcast would continue to buy 1-2% equity stake of the company each year until 2032, ultimately owning 53% of MASN, while the Orioles and the Nationals would each own 23.5%.¹⁷¹ Following, Comcast would pay each team \$42.5 million in television rights fees in 2012, which would increase by 4% per year until 2031.¹⁷² Major League Baseball made the blanket claim that this would be a better deal for the Orioles than the RSDC decision, but also revealed faulty logic in its own reasoning with the RSDC.¹⁷³

This offered deal projected MASN's profit margins to be about 36% annually, while the RSDC had rejected MASN's requested profit margin of 30%, calculated using the Bortz methodology.¹⁷⁴ The RSDC said 30% was too much for MASN, citing 2007, the first operational year for MASN, while this deal says that it would not be too much for MASN if Comcast owned it.¹⁷⁵ Major League Baseball also previously argued that MASN should be paying each team \$300 million from 2012 to 2016, but if Comcast owned the station, each team would only be receiving \$230 million.¹⁷⁶ Finally, as per the original deal, MASN, the Orioles and the Nationals

¹⁶⁸ *Id.*

¹⁶⁹ *Two New Developments in the MASN Dispute*, *supra* note 159.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Two New Developments in the MASN Dispute*, *supra* note 159.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

would renegotiate television rights fees every five years, but Comcast would suffer from no such obligation.¹⁷⁷

Separate from the disclosed documents which show previous offers, the grant of discovery also provided support for, in greater detail and in greater scope, MASN's conflict of interest claim regarding the law firm, Proskauer Rose.¹⁷⁸ On January 12, 2015, MASN filed more documents with the court after reviewing information turned over by Major League Baseball.¹⁷⁹ The network now claims that though a conflict of interest has always been an integral part of the dispute, there is evidence that Major League Baseball, the RSDC and the Nationals were more connected to Proskauer Rose than was previously thought.¹⁸⁰ There is proof that between 2005 and 2014, Proskauer Rose represented Major League Baseball in 74 instances, with 49 of those instances occurring during the arbitration.¹⁸¹ This happened while the firm also represented the Nationals and provided counsel for Selig during \$22 million employment contract negotiations, and also represented the Rays, Pirates and Mets' owners (again, the teams which made up the RSDC).¹⁸²

Discovery also provided more information regarding the \$25 million loan from Major League Baseball to the Nationals. It was expected the loan would be paid back with money earned from the renegotiated television rights fees.¹⁸³ MASN claims that the payment was

¹⁷⁷ *Two New Developments in the MASN Dispute*, *supra* note 159.

¹⁷⁸ James Wagner, *MASN makes more claims about MLB's conflicts of interest*, THE WASHINGTON POST (Jan. 14, 2015), <http://www.washingtonpost.com/blogs/nationals-journal/wp/2015/01/14/masn-makes-more-claims-about-mlbs-conflicts-of-interest/>.

¹⁷⁹ *Id.*

¹⁸⁰ *MASN makes more claims about MLB's conflicts of interest*, *supra* note 176.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Washington Nationals, Baltimore Orioles split over MASN cable TV rights fee*, *supra* note 61.

unknown to the network until 2013, many months after the deal was orchestrated and then the network did not receive a copy of that agreement until this court case started.¹⁸⁴

An attorney for the Orioles, Alan Rifkin, offered testimony regarding this \$25 million loan: he met with Manfred, who was still answering to Selig, in June 2014 and discussed the loan.¹⁸⁵ Manfred then revealed the League was under a great amount of stress to repay the loan to a third-party lender and at this time, Manfred revealed a copy of the agreement to Rifkin.¹⁸⁶ Rifkin testified that Manfred was nervous about the loan, asking the lawyer, “How bad is it?”¹⁸⁷ Rifkin also testified that, “I also reiterated to Mr. Manfred... what had been said in our meeting on April 24, 2014, that the arrangements between [Major League Baseball] and the Nationals confirmed that the Major League Baseball panel process was a fraud intended to force a partnership restructuring.”¹⁸⁸ Of course, Major League Baseball argues that Manfred solely offered support to the members of the RSDC.¹⁸⁹

It is no wonder it was so difficult to make Major League Baseball turn over such documents, as they revealed valuable information, which would hurt its cause. This damage is not just limited to the courts, but reaches the general public. Therefore, with this discovery demand and the information, which resulted from it, difficulties continue for Major League Baseball. The League wished to keep this conflict away from legal action, as legal action means unwanted publicity.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Washington Nationals, Baltimore Orioles split over MASN cable TV rights fee, supra* note 61.

¹⁸⁹ *Id.*

IV. Possible Results, Solutions and Repercussions

A. Court Proceeding Outcomes & Solutions

Legal action creates unwanted publicity, as the information discussed during court proceedings would be freely open to the public. Though it is not positive whether this conflict will go to trial, if it does, the transcript will not be sealed.¹⁹⁰ This means, “any documents introduced about the finances of baseball or its individual teams, would be open record.”¹⁹¹ This is important because “baseball has fought very hard to avoid ever doing this” and this is most likely because “players will see how much money the teams are hiding.”¹⁹²

Though Major League Baseball was not extremely cooperative with the discovery demand, if MASN continues on the road to trial, it could be that Major League Baseball will become much more appealing in negotiating a settlement.¹⁹³ Furthermore, though things are looking positive for the Baltimore Orioles, the Settlement Agreement was designed to be unfair to the Washington Nationals from the outset, which could be used to argue against the unfairness the Orioles faced in losing sole possession of their territory.¹⁹⁴

Though MASN appears to show no signs of letting up on its heading to trial, and Major League Baseball shows no signs of acquiescing either, there is a possible solution outside the realm of Orioles-win-or-Nationals-win. In 2016, MASN as a local sports television network will be able to renegotiate what it is paid by Comcast, the main cable provider, in subscriber fees for its television rights.¹⁹⁵ If MASN can receive more money per subscriber, it will be able to

¹⁹⁰ Brown, *supra* note 51.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ Matt Perez, *Possible Solutions*, CAMDEN DEPOT (Mar. 18, 2014), <http://camdendepot.blogspot.com/2014/03/possible-solutions-to-masn-conflict-and.html>.

increase the amount of money paid to both the Orioles and the Nationals without risking bankruptcy.¹⁹⁶

MASN comes to the table with a great deal of bargaining power as well. To illustrate, MASN was paid just \$2.28 per subscriber (per month) in 2013—this is compared to what the Comcast Sports Net Mid-Atlantic (CSN Mid-Atlantic) was paid, which was \$4.33.¹⁹⁷ Furthermore, Comcast was originally in talks to create a local sports television network with the Orioles and Nationals, which was not successful, but successful enough for Comcast to provide projected numbers.¹⁹⁸ Comcast painted the picture that the network would be able to charge \$3.95 per subscriber in “core regions” and \$1.97 outside of those regions.¹⁹⁹

To reiterate, MASN was paid a subscriber fee across the board close to what Comcast had envisioned for “outer regions”; meanwhile, CSN Mid-Atlantic received a subscriber fee higher than those promised in the core regions.²⁰⁰ This is even more absurd when the teams each network broadcasts are compared. Though both networks broadcast the games of several teams, both have two main teams: MASN, of course, broadcasts the Washington Nationals and the Baltimore Orioles, while CSN Mid-Atlantic broadcasts the Washington Wizards (basketball) and the Washington Capitals (hockey).²⁰¹

In 2013, the Nationals and the Orioles separately averaged a bigger audience than the Wizards and the Capitals combined.²⁰² Furthermore, baseball has a longer season than either sport, meaning MASN has more opportunity for sporting events, as in more opportunity for

¹⁹⁶ *Possible Solutions*, *supra* note 195.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Possible Solutions*, *supra* note 195.

²⁰² *Id.*

“must-see television” and more opportunity for advertising space.²⁰³ Therefore, it would appear MASN has an open-and-shut case for a higher subscriber fee, but there is one slight drawback.

Comcast, as mentioned, is the primary cable provider in the Mid-Atlantic region and it is not likely that the company would pay more money to a rival local sports television network, while it has one of its own.²⁰⁴ Therefore, MASN really needs Comcast, and though it can present a strong argument for higher subscriber fees, Comcast truly holds the power.²⁰⁵ Though this would appear to help solve the problems for MASN, the Orioles, the Nationals and Major League Baseball, it is more likely that a judge will have to determine this outcome before such talks are given the chance to arise (and most likely be shut down).

B. Baseball and TV in the Future

Above all, the most important thing to keep in mind, as is the case with all of broadcast, cable and satellite television, is the future of the industry: streaming and what that might mean for business and broadcasting rights.²⁰⁶ Broadcasting and cable companies are biting their nails over what the future of their business looks like due to the advent of streaming and with a large percentage of viewers watching their television while cutting the cable. Perhaps this dispute will prove to be such a headache for all parties involved, that paired with streaming technology, most teams in the future will opt to have their own streaming channel which can be reached outside of a specific region, not in conjunction with another team. Outside of this theoretical discussion about the future technology of the media industry however, there are very real, immediate consequences.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ Vazquez, *supra* note 23.

If the declaration for the Washington Nationals is upheld, the Orioles suffer in two ways (by shifting money from “MASN profits to the rights fees”): “One, they lose the 85% of money that they would have collected from what would be shifted to the Nationals rights fees. Two, they would lose 34% of money shifted to their own rights fees as part of the revenue sharing tax.”²⁰⁷ Additionally, if the proceedings result in the Orioles and the Nationals making \$60 million more in rights fees, “that’s potentially \$71 million annually that now goes to the Orioles that would be lost if this arbitration award is forced upon them.”²⁰⁸ There is even a question if MASN could continue to exist, at least in the form it is known today, if “it was forced to have another \$120 million in expenses over what it now possesses.”²⁰⁹

Furthermore, the Orioles are already suffering now. Grantland’s Jonah Keri explains that because the outcome of the dispute could go any way, it is possible that the Orioles finances would be severely affected.²¹⁰ If Major League Baseball wins, it is likely that MASN, at a loss to the Orioles, would have to pay much higher television rights fees to the Nationals without any benefit to the Orioles.²¹¹ As a result, “Angelos has been cautious with his approach to the team, not knowing what could happen given the massive shift that could go against him.”²¹² In other words, because Angelos does not know how much money the team will have as a result of the dispute, he is being careful with money now, refusing to increase the payroll or spend exorbitant amounts on the team now.²¹³

²⁰⁷ Brown, *supra* note 51.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ Jonah Keri, *For the Birds*, GRANTLAND (Feb 5. 2014), <http://grantland.com/features/baltimore-orioles-offseason-spending-al-east/>.

²¹¹ Keri, *supra* note 210.

²¹² *Id.*

²¹³ *Id.*

Further, the team was signed on to host the All-Star game in 2016 and it is no coincidence that it is now being pulled from the city.²¹⁴ The Orioles' attempt to host the 2016 All-Star game was a long one: beginning in 2013.²¹⁵ The last time Baltimore hosted the game was 22 years ago and the team wished to host the game for the 25th season at Camden Yards.²¹⁶ The Orioles went so far as to book a convention center for that weekend.²¹⁷ Furthermore, the Orioles' chances to host the game were promising: the game usually alternates between American League teams and National League teams, and the Cincinnati Reds, a National League team, are hosting in 2015.²¹⁸ Chances looked so good that Bud Selig recognized the Orioles as a "viable candidate" in May 2014.²¹⁹ Though the dispute between the Orioles, the Nationals and Major League Baseball provided some concern about whether the Orioles would be denied the game, Selig claimed he would view the suit and the game as two separate issues and in mid-December 2014, the Orioles were the leading candidate for host of the 2016 All-Star game.²²⁰

Just one week later however, major reports came to light that San Diego would host the 2016 game.²²¹ It was claimed that the Orioles did not submit proper documentation to be given the game, but that seems unlikely as (1) the Orioles are owned by one of the most prominent lawyers in the United States and (2) the Orioles had been so set on hosting the game that the team had been planning for over a year.²²² Furthermore, it is no coincidence, and even more evidence the snub was due to the suit: it has been reported that the Washington Nationals will be

²¹⁴ Craig Calcaterra, *Mess with MLB? Lose your All-Star Game*, NBC SPORTS HARDBALL TALK (Dec. 29, 2014), <http://hardballtalk.nbcsports.com/2014/12/29/mess-with-mlb-lose-your-all-star-game/>.

²¹⁵ Jeff Long, *The Cost of Being on Baseball's Bad Side*, JUST A BIT OUTSIDE, <http://www.foxsports.com/mlb/just-a-bit-outside/story/baltimore-orioles-camden-yards-bud-selig-all-star-game-masn-012415> (last visited Feb. 14, 2015).

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ Long, *supra* note 215.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

hosting the game in 2018 even though the 2017 host has not been announced yet.²²³ If this is true, and because Major League Baseball tends to avoid hosting games in the same region within a short time (with New York City as an exception), the Orioles will likely not see the All-Star game for a number of years.²²⁴

This has multiple impacts on the Orioles, in terms of economics and of attendance.²²⁵ Though the economic impact of hosting the All-Star game is difficult to calculate, it is far greater than the investment the city must make.²²⁶ Major League Baseball provides some figures for the economic value of the All-Star game: the value of the past 10 games is about \$85 million on average.²²⁷ Two of those games however, were hosted in New York, which had extremely high economic values, of about \$140 million each.²²⁸ Not taking into account the New York games, the economic value of the All-Star game in recent years is about \$64 million.²²⁹

In terms of attendance, teams who have hosted the game in the past have seen an increase in ticket sales for that season.²³⁰ This is because a team can expand the season-ticket base for that year the team hosts the game, as, usually, the only way teams guarantee All-Star tickets is to buy the season-ticket plan.²³¹ Of course, season tickets are the most reliable form of sales during the season and they provide the team with a certain level of cost-certainty.²³² Without the game however, the Orioles have neither the benefit of the economic value or the guaranteed ticket sales

²²³ Long, *supra* note 215.

²²⁴ PALMER, *supra* note 1, at 127.

²²⁵ Long, *supra* note 215.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ Long, *supra* note 215.

²³¹ *Id.*

²³² *Id.*

and it is hard to deny that if it were not for the ongoing lawsuit, the Orioles would be hosting the All-Star game in 2016.

Interestingly, Bud Selig is also retiring in the midst of this controversy.²³³ Also, as mentioned before, it is Selig's right-hand man, Rob Manfred who has been appointed to take over as commissioner in January 2015.²³⁴ What is interesting is that Manfred, who officially took over for Selig as commissioner on January 25, seems to be suggesting peace in the future.²³⁵ In a conversation with press representatives on February 4, Manfred alluded: "I'm not going to say a lot about MASN because it is in litigation. I will say this much. I think in reasonably short order, there will be a resolution of MASN, either by the litigation being done or some other mechanism."²³⁶ Manfred also seems to seek to relieve the concerns about the Orioles not seeing the All-Star game for a number of years when it looked like they were going to host the game in 2016.²³⁷ In the same conversation, Manfred said: "We think of Baltimore and Washington as separate franchises, separate cities, and I don't think having an All-Star game in one would be a disqualifying or hindering factor for the other."²³⁸ Though these comments seem to have some resemblance of an olive branch, the dispute is far from resolution.

In fact, there is a possibility that even if Major League Baseball could be victorious in trial, but ultimately lose out: because of their finances being made public by the proceeding, players would now be more aware of this financial information the League has tried to keep

²³³ Paul Hagen, *Selig will retire as Commissioner in January 2015*, MLB.COM (Sept. 26, 2013), <http://m.mlb.com/news/article/61825598/>.

²³⁴ Matt Bonesteel, *Here's everything you need to know about Rob Manfred, MLB's new commissioner*, THE WASHINGTON POST (Aug. 14, 2014), <http://www.washingtonpost.com/blogs/early-lead/wp/2014/08/14/heres-everything-you-need-to-know-about-rob-manfred-mlbs-new-commissioner/>.

²³⁵ *Rob Manfred predicts peace in O's, Nats TV war*, *supra* note 133.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

secret. This information could then be used to seriously affect the outcomes of labor negotiations.²³⁹

Conclusion

What this dispute and the events disseminating from this dispute really mean is that it does appear Major League Baseball did seriously, monetarily and legally, wrong the Baltimore Orioles. This is evident in the way the court case between MASN, the Orioles, the Nationals and Major League Baseball is proceeding. Even though arbitration decisions are notoriously hard to get overturned, the New York Supreme Court has found enough legitimacy in the Orioles' arguments to grant the party the proceeding in general, the injunction, the discovery demand and the merits hearing so far.

At the most basic level, and returning to the United States Code §§ 10(a)(1)-(4) and the New York Code §§ 7511(b)(1)(ii)-(iii), cited in the Orioles original petition to the New York Supreme Court in 2014, the panel making the arbitration proceeding was clearly partial and the rights of the Orioles as a party in the arbitration were seriously prejudiced due to this bias. The RSDC was made up of teams who had something to benefit by deciding on an award which would add more money to the revenue sharing pool, as two of those teams are beneficiaries of the revenue-sharing money. Further, it has been made known that Major League Baseball contributed large amounts in private loans to the Washington Nationals, and further added to this partiality of the RSDC when the League provided legal help and guidance during the arbitration process through its own representatives and its legal counsel.

²³⁹ Brown, *supra* note 51.

It also now makes sense as to why Baseball was so reluctant to turn over documents concerning the dispute in December of 2014: the documents contain information which makes the Orioles' allegations, solidified facts. The documents contain proof of the Orioles' cooperation and Baseball's, and the Nationals', obstruction in reaching a settlement before the Orioles went to court. Additionally, the documents reveal that Baseball, the Nationals and the RSDC were not just all associated generally with the same law firm, but all four entities were actually actively intertwined during the arbitration process, an undeniable partiality. Further, though it was previously accepted as truth, the documents solidified the fact that Baseball did in fact loan the Nationals tens of millions of dollars without notifying MASN or the Orioles.

As of March 21, 2015, with no documentation of what occurred during the March 2, 2015 hearing, it appears that the dispute is heading into trial. If this is the case, chances are good that the Orioles will walk away from the entire dispute with what they asked for in September 2014: for the RSDC's decision to be thrown out and for the award to be renegotiated. There is the chance that litigation will be so tedious that the parties will settle out of court, and for Baseball's sake, which appears to be losing every contest in this case so far, this is probably the best route for the League to take. Currently though, no parties show any willingness to compromise this far along in the dispute and it is likely that a resolution will be handed down by the Court. No one knows when this will be however, though the general sentiment is now later, rather than sooner: the opposite of what Commissioner Manfred hinted at in January 2015.

Ultimately however, this situation has never occurred before, so there is no precedent to follow: there has never been "a team waging a court battle by proxy against another team and the league in general."²⁴⁰ Whatever unfolds in the coming months will have no precedent and will

²⁴⁰ Brown, *supra* note 51.

set one likely to impact not only Major League Baseball and its teams, but all professional sports leagues and the broadcasting industry as a whole.

Trade Secrets and Patent Protection:

The Unlikely Power Couple Under the AIA

Heather Roark Parker ¹

Abstract

Trade secret law and patent law have coexisted in the United States for over a century; each with its own parameters for protection of intellectual property. It has long been argued the two areas of law are distinct and cannot be used synergistically to protect a common piece of information or invention. However, in Kewanee Oil Co. v. Bicron Corp.,² a landmark decision of the United States Supreme Court, the Court concluded that the “extension of trade secret protection to clearly patentable inventions does not conflict with the patent policy of disclosure.”³ Relying upon the language within this decision, legal scholar Professor Karl F. Jorda has suggested trade secret law may be used in conjunction with patent law to protect the “tremendous volume of collateral or associated know-how that exists for any patentable invention.”⁴ Arguably, Professor Jorda’s approach offers considerable benefits to inventors following the enactment of the Leahy-Smith America Invents Act (“AIA”) in 2011. The AIA has introduced several substantive changes that encourage inventors to protect their inventions not only through the patent system, but trade secret as well. A hybrid approach of protection through trade secret law and patent law offers the greatest security against third party invalidity challenges under the AIA.

¹ Syracuse University College of Law, Juris Doctor expected 2016

² Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974).

³ *Id.* at 491.

⁴ Karl F. Jorda, *The Foulston Siefkin Lecture: Patent and Trade Secret Complementariness: An Unsuspected Synergy*, 48 WASHBURN L.J. 1, 6 (Fall 2008).

I. Introduction

Trade secret law and patent law have coexisted in the United States for over a century; each with its own parameters for protection of intellectual property. It has long been argued, the two areas of law are distinct and cannot be used synergistically to protect a common piece of information or invention. However, in Kewanee Oil Co. v. Bicron Corp.,⁵ a landmark decision of the United States Supreme Court, the Court concluded that the “extension of trade secret protection to clearly patentable inventions does not conflict with the patent policy of disclosure.”⁶ Relying upon the language within this decision, legal scholar Professor Karl F. Jorda has suggested trade secret law may be used in conjunction with patent law to protect the “tremendous volume of collateral or associated know-how that exists for any patentable invention.”⁷

On September 16, 2011, the Leahy-Smith America Invents Act (“AIA” and “Act”) was enacted into law.⁸ The AIA introduced significant changes to the United States patent system: filing, examination, and third party reforms.⁹ Senator Patrick Leahy, for which the Act carries his namesake, argued the goals of the Act were to “improve the application process,” “improve the quality of patents issued by the USPTO [United States Patent and Trademark Office],” and “provide more certainty in [patent] litigation.”¹⁰ Arguably, Professor Jorda’s approach offers

⁵ Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974).

⁶ *Id.* at 491.

⁷ Karl F. Jorda, *The Foulston Siefkin Lecture: Patent and Trade Secret Complementariness: An Unsuspected Synergy*, 48 WASHBURN L.J. 1, 6 (Fall 2008).

⁸ Memorandum from the U.S. Patent and Trademark Office on the America Invents Act: Effective Dates (Oct. 5, 2011) (on file with U.S. Patent and Trademark Office), available at http://www.uspto.gov/sites/default/files/aia_implementation/aia-effective-dates.pdf.

⁹ *Summary of the America Invents Act*, AMERICAN INTERNATIONAL PROPERTY LAW ASSOCIATION, <http://www.aipla.org/advocacy/congress/aia/Pages/summary.aspx> (last visited Mar. 19, 2015).

¹⁰ Robert L. Maier, *The Big Secret of the America Invents Act*, BAKER BOTTS LLP (Dec. 2011), http://www.bakerbotts.com/files/Uploads/Documents/Maier_DEC11.pdf.

considerable benefits to inventors following the enactment of the Leahy-Smith America Invents Act in 2011. The AIA has introduced several substantive changes that encourage inventors to protect their inventions not only through the patent system, but trade secret as well. A hybrid approach of protection through trade secret law and patent law offers the greatest security against third party invalidity challenges under the AIA.

This note will outline a hybrid approach to protecting an invention, under both patent law and trade secret law. This note will begin with a substantive review of patent law and trade secret law, highlighting the differences that support mutual exclusivity. Then this note will discuss how two of the AIA provisions encourage inventors to seek dual protection, indicating mutual exclusivity between patents and trade secrets is not absolute. Finally, this note will present several cases that illustrate the potential, and conceivable implementation, of hybrid protection.

II. Trade Secrets

Trade secrets encompass any confidential business information that may provide a competitive advantage.¹¹ Information of this type typically include manufacturing or industrial secrets and commercial secrets.¹² The unauthorized use of such information is regarded as an unfair practice and often results in legal consequences.¹³

¹¹ *What is a Trade Secret?*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, http://www.wipo.int/sme/en/ip_business/trade_secrets/trade_secrets.htm (last visited Mar. 19, 2015).

¹² *What is a Trade Secret?*, *supra* note 10.

¹³ *Id.*

A. Overview

The Restatement (Third) of Unfair Competition contains the most recent, and most broad, definition of trade secret. According to this Restatement, trade secret is any information used by a business that is “sufficiently valuable and secret to afford an actual or potential economic advantage over others.”

However, the most commonly recognized and widely used definition of trade secret in the United States is set forth in the Restatement of Torts. As such, a trade secret “may consist of any formula, pattern, device, or compilation of information which is used in one’s business” and provides that business an opportunity to gain advantages over competitors who are without the pertinent information. Trade secrets have been posturized to cover over 90% of all new technology.¹⁴ In addition, over 80% of all licenses and technology transfer agreements contain some form of a trade secret.¹⁵

B. History of Trade Secrets

Trade secret law is the oldest form of intellectual property protection.¹⁶ Inception of trade secret protection can be traced to pre-literate societies, recognized for their lack of written laws and formal government able to support trade secret regimes.¹⁷ In the absence of structured legal boundaries, inventors would utilize complex rituals believed to initiate “magical”

¹⁴ Jorda, *supra* note 6, at 2.

¹⁵ *Id.* at 10.

¹⁶ Jorda, *supra* note 6, at 8.

¹⁷ Dominick Severance, *A General History of Western Trade Secret Law from the Time of Preliterate Society to Today – Pt. 1*, KING HALL IP LAW ASSOCIATION (Jan. 22, 2013), http://students.law.ucdavis.edu/ip/ip_news/posts/tradesecretlawpt1.html.

protection of their intellectual property.¹⁸ It was through this technique that inventors sought to protect their secrets by incorporating “magic” to make it more difficult for another to duplicate.¹⁹

By the height of the Roman Empire in A.D. 117,²⁰ a structured government had been implemented and quickly became a ubiquitous element of people’s lives.²¹ However, historians have been unable to identify any Roman law pertaining to trade secrets. One historian, A. Arthur Schiller, inferred private causes of action relating to slaves provided a method by which to try commercial trade secret disputes.²² Schiller further argued Roman law recognized “‘enticement to communicate business secrets’ and that the remedy for such instigation was the *actio servi corrupti* [action for corrupting a slave].”

Unfortunately, historians have been unable to identify direct evidence indicating the Roman courts implemented *actio servi corrupti* in this manner. For this reason, there is a continued state of unrest as to whether the Roman Empire was the first government to implement legal guidelines pertaining to trade secrets.

Trade secret protection was first established in the United States in the influential case, Peabody v. Norfolk.²³ An 1868 case decided in the Commonwealth of Massachusetts, the court ruled that an employee’s duty to protect his employer’s trade secrets is grounded in both express contracts and the confidential relationship existing between the two employment entities.²⁴ In

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Joshua J. Mark, *Roman Empire*, ANCIENT HISTORY ENCYCLOPEDIA (Apr. 28, 2011), http://www.ancient.eu/Roman_Empire/.

²¹ Dominick Severance, *A General History of Western Trade Secret Law from the Time of Preliterate Society to Today – Pt. 1*, KING HALL IP LAW ASSOCIATION (Jan. 22, 2013), http://students.law.ucdavis.edu/ip/ip_news/posts/tradesecretlawpt1.html.

²² *Id.*

²³ 98 Mass. 452 (1868)

²⁴ 98 Mass. 452 (1868).

addition, the court discerned the employee was only responsible for protecting discrete and tangible things from disclosure, such as recipes or drawings.²⁵ From this decision, the courts expanded trade secret protection to cover intangible things, such as know-how and compilations of publicly available facts.²⁶

C. What constitutes a trade secret?

Essentially, a trade secret is “any propriety technical or business information often embodied in inventions, know-how, and show-how.”²⁷ A trade secret may consist of a chemical compound, process of manufacturing, or even a customer list.²⁸ Courts have consistently relied upon this definition of trade secret to determine whether a trade secret exists within the operation of a business. To make this determination, courts look to the following criteria:

“[1] The extent to which the information is known outside of [the] business; [2] the extent to which it is known by employees and others involved in [the] business; [3] the extent of measures taken by the claimant to guard the secrecy of the information; the value of the information to the business and its competitors; [4] the amount of effort or money expended by the business in developing the information, and; [5] the ease or difficulty with which the information could be properly acquired or duplicated.”²⁹

Thus, simply acknowledging the information constitutes “know-how” does not establish an enforceable intellectual property right through trade secret law.³⁰ In order for the information to be considered a trade secret, the information must offer some economic value to the business

²⁵ *Id.* at 459.

²⁶ *Id.* at 461.

²⁷ Dominick Severance, *A General History of Western Trade Secret Law from the Time of Preliterate Society to Today – Pt. 1*, KING HALL IP LAW ASSOCIATION (Jan. 22, 2013), http://students.law.ucdavis.edu/ip/ip_news/posts/tradesecretlawpt1.html.

²⁸ Jorda, *supra* note 6, at 9.

²⁹ *Id.*

³⁰ Jorda, *supra* note 6, at 3.

and measures must be implemented to secure its secrecy.³¹ When a trade secret is in dispute, the court will place great emphasis on the information's expectation of secrecy. To ensure proper measures have been taken to keep the propriety information secret, the trade secret owner must take "reasonable affirmative measures to maintain" secrecy. Such measures include:

[1] memorializing a trade secret policy in writing; [2] informing employees of the trade secret policy; [3] having employees sign employment agreements with confidentiality obligations; [4] restricting access to trade secrets (on a need-to-know basis); [5] restricting public accessibility (escorting visitors); [6] locking gates and cabinets to sites that house trade secrets; [7] labeling trade secret documents as proprietary and confidential; [8] screening speeches and publications of employees; [9] using secrecy contracts in dealing with third parties; and [10] conducting exit interviews with departing employees."³²

However, it is critically important to recognize any information that is readily ascertainable cannot be protected as a trade secret. Due to the high rate of employee turnover, combined with the possibility of reverse engineering or analysis of products by competitors, the average life span of a trade secret is about 3 to 5 years.³³

D. Trade Secret Protection under the American Uniform Trade Secrets Act ("UTSA")

The American Uniform Trade Secrets Act ("UTSA") provides a legal framework for improved trade secret protection for industry, and is endorsed by the American Bar Association ("ABA").³⁴ The UTSA was first published by the Uniform Law Commission ("ULC") in 1979,

³¹ *Id.*

³² Jorda, *supra* note 6, at 7-8.

³³ *Id.*

³⁴ *Legislative Fact Sheet – Trade Secrets Act*, UNIFORM LAW COMMISSION, <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Trade%20Secrets%20Act> (last visited Feb. 8, 2016).

and was further amended in 1985.³⁵ As of May 2013, the UTSA has been enacted by forty-seven states, and by the District of Columbia, Puerto Rico, and the United States Virgin Islands.³⁶

Prior to the development of the UTSA, trade secret misappropriation was addressed at the state level. Thus, standards and remedies regarding misappropriation of trade secrets were primarily founded in common law on a state-by-state basis.³⁷ The UTSA states the motivating factors for its development concern the prevalence of interstate commercial transaction that extend beyond the jurisdiction of a single state.³⁸ As such, the UTSA consists of uniform standards that can be enacted by multiple states capable of alleviating the uncertainty of trade secret law across the United States.³⁹

III. Patents

A patent is the exclusive right granted for an invention that provides a new solution to a known problem.⁴⁰ To obtain a patent for an invention, the technical information concerning the invention must be disclosed to the public in a patent application.⁴¹

³⁵ See UNIF. TRADE SECRETS ACT WITH 1985 AMENDMENTS (1985).

³⁶ Uniform Law Commission, *supra* note 34.

³⁷ Legal Information Institute, *Trade Secret*, CORNELL UNIVERSITY LAW SCHOOL, https://www.law.cornell.edu/wex/trade_secretct (last visited Jan. 8, 2015).

³⁸ UNIF. TRADE SECRETS ACT WITH 1985 AMENDMENTS (1985).

³⁹ See *id.*

⁴⁰ WIPO, *What is a patent?*, <http://www.wipo.int/patents/en/#basics> (last visited Feb. 8, 2016).

⁴¹ *Id.*

A. Overview

Patent protection grants the inventor the right to exclude others from making, using, selling, offering to sell, and importing that invention.⁴² In order for any invention to receive patent protection, it must be new (novel), useful, nonobvious, consist of eligible subject matter, and is properly disclosed.⁴³ In general, patents protect inventions of tangible things, most commonly methods, machines, articles, and compositions.⁴⁴

In patent law, three different analyses are conducted: patentability, infringement, and freedom-to-operate (a.k.a. right-to-use). Patentability is the most common ground for patents to be deemed invalid, and thus, unenforceable. Patentability compares the invention to everything that would be known to one skilled in the art. As such, patentability is largely a determination of novelty and nonobviousness. However, as more patents applications are filed to protect inventions regarding the biological sciences, eligible subject matter has also become a defining element of patentability.

B. History of Patents

The word “patent” is derived from the Latin phrase “*litterae patentes*,” which is interpreted to mean “open letter.”⁴⁵ These letters were utilized by medieval monarchs to confer

⁴² Robert Patrick Merges & John Fitzgerald Duffy, *Patent Law and Policy: Cases and Materials*, LexisNexis, Jul. 25, 2013.

⁴³ USPTO, *United States Code Title 35 – Patents*, http://www.uspto.gov/web/offices/pac/mpep/consolidated_laws.pdf (Jan. 2014).

⁴⁴ Merges & Duffy, *supra* note 42.

⁴⁵ Thomas Reuters, *The History of Patents*, <http://ip-science.thomsonreuters.com/support/patents/patinf/patentfaqs/history/> (last accessed Jan. 8, 2015)

rights and privileges to an individual, including inventors.⁴⁶ By obtaining an open letter from the monarchy, the individual had tangible proof of the conferred rights, available for all to see.⁴⁷

Historians are unable to identify any one country that can be credited for instituting the first system for patenting inventions.⁴⁸ However, it is generally acknowledged that that first informal system was developed in Renaissance Italy, implemented to protect Venetian glass-blowers' skills against others.⁴⁹ It was not until 1449 that the first recorded patent of invention was granted to John of Utynam, England. John was awarded a 20 year monopoly for his inventive glass-making technique.⁵⁰ In return for his monopoly, John was required to teach his process to other Englishmen.⁵¹ This *quid pro quo* system has become a critical component of patent protection worldwide.⁵²

Following the American Revolution, the newly formed colonies adopted a patent system similar to England's. Article I, section 8 of the Constitution was ratified in 1788⁵³ and includes:

“The Congress shall have power...to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writing and discoveries.”⁵⁴

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Thomas Reuters, *The History of Patents*, <http://ip-science.thomsonreuters.com/support/patents/patinf/patentfaqs/history/> (last accessed Jan. 8, 2015)

⁵¹ *Id.*

⁵² Robert Patrick Merges & John Fitzgerald Duffy, *Patent Law and Policy: Cases and Materials* 1046 (LexisNexis, 6th ed. 2013).

⁵³ *Id.* at 7.

⁵⁴ U.S. CONST. art. I, § 8, cl. 8.

In modern day, patent protection is controlled by the United States Patent and Trademark Office (“USPTO”).⁵⁵ The USPTO is responsible for reviewing patent applications submitted by inventors.⁵⁶ Examiners within the USPTO review the technology disclosed within the application to determine if it is new and useful.⁵⁷ If so, the inventor will be granted a patent and awarded twenty years of protection.⁵⁸

C. Patent Protection under the Patent Act of 1952

The United States Patent Act of 1952 simplified and clarified provisions in the existing United States Patent law. It also affected the law substantively, introducing the “invention requirement” under 35 U.S.C § 103.⁵⁹ Under this provision, non-obvious subject matter became a critical consideration in evaluating an invention for patent protection. An invention may be denied a patent if its subject matter “as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art.”⁶⁰

In addition, an amendment was later added to the Patent Act in 1970.⁶¹ This amendment incorporated the Patent Cooperation Treaty (“PCT”), which has since been signed by 148 countries.⁶² The PCT simplified the filing of a patent application on the same invention in

⁵⁵ *Patents*, United States Patent and Trademark Office (Oct. 29, 2011), <http://www.uspto.gov/about-us>.

⁵⁶ *Id.*

⁵⁷ Merges and Duffy, *supra* note 52, at 13.

⁵⁸ *Id.* at 59.

⁵⁹ *Id.* at 624

⁶⁰ Pre-AIA, 35 U.S.C. § 103(a).

⁶¹ Merges and Duffy, *supra* note 52, at 56.

⁶² *Patent Cooperation Treaty Status on January 15, 2015*, United States Patent and Trademark Office (Jan. 15, 2015), <http://www.wipo.int/export/sites/www/treaties/en/documents/pdf/pct.pdf>.

different countries by centralizing filing procedures and implementing a standardized application format.⁶³

D. Patent Protection under the Leahy-Smith America Invents Act (“AIA”)

In order to foster universal international patent procedures, the United States enacted the Leahy-Smith America Invents Act.⁶⁴ The AIA initiated several reforms to the United States patent system and law, most notably the shift from the “first to invent” system to “first to file.”⁶⁵ Prior to its enactment, the United States patent system embraced a “first to invent” system, meaning the inventor who could prove earliest conception was awarded the patent.⁶⁶ However, the majority of foreign nations embraced a “first to file” system, essentially creating a race to the patent office.⁶⁷ The AIA eliminated the “first to invent” system and implemented the internationally preferred “first to file.”⁶⁸ As a result, even if the last inventor to file was the first to conceive the invention, the patent will be awarded to the first inventor to file an application.⁶⁹

In addition, the AIA also introduced two review procedures to determine the validity of issued patents: Post-Grant Review and Inter Partes review.⁷⁰ In particular, the new procedures

⁶³ Merges and Duffy, *supra* note 52, at 11.

⁶⁴ Office of the Press Secretary, *President Obama Signs America Invents Act, Overhauling the Patent System to Stimulate Economic Growth, and Announces New Steps to Help Entrepreneurs Create Jobs*, The White House, (Sept. 16, 2011), <http://www.whitehouse.gov/the-press-office/2011/09/16/president-obama-signs-america-invents-act-overhauling-patent-system-stim>.

⁶⁵ *America Invents Act: Effective Dates*, UNITED STATES PATENT AND TRADEMARK OFFICE (Oct. 5, 2011), http://www.uspto.gov/sites/default/files/aia_implementation/aia-effective-dates.pdf.

⁶⁶ Gene Quinn, *A Brave New Patent World – First to File Becomes Law*, IPWATCHDOG (Mar. 16, 2013), <http://www.ipwatchdog.com/2013/03/16/a-brave-new-patent-world-first-to-file-becomes-law/id=37601/>.

⁶⁷ Jeff John Roberts, *“First to file” patent law starts today: what it means in plain English*, GIGAOM (Mar. 18, 2013, 4:46 PM), <https://gigaom.com/2013/03/18/first-to-file-patent-law-starts-today-what-it-means-in-plain-english/>.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *America Invents Act: Effective Dates*, *supra* note 65.

for review provide additional opportunities for third parties to challenge another's patent in the hopes for it to be held invalid, and thus, eliminate the protections surrounding the technology.⁷¹

E. Reexamination of Issued Patents

Once the patent office issues a patent, efforts by accused infringers to challenge the validity of that patent primarily surfaced in court as defenses in an infringement suit.⁷² However, there were no proceedings available to third parties to challenge a patent's validity outside the context of an infringement suit.⁷³ In 1980, Congress sought to establish a system of administrative reexamination of patents.⁷⁴ Reexamination gives the USPTO the opportunity to reconsider the validity of the claims disclosed in an issued patent. In implementing a system of administrative reexamination, Congress theorized it could serve as a substitute for infringement litigation, thus providing an "efficient resolution of questions about the validity of issued patents without recourse to expensive and lengthy infringement litigation."⁷⁵

i. Reexamination pre-AIA

Reexamination was first made available in 1980 as an Ex Parte proceeding, to be conducted between the patent owner and the USPTO.⁷⁶ To challenge the validity of a patent, two procedures were available: request an Ex Parte reexamination or raise the challenge as a

⁷¹ ROBERT PATRICK MERGES & JOHN FITZGERALD DUFFY, *Patent Law and Policy: Cases and Materials* 1046 (LexisNexis, 6th ed. 2013).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ 1980 U.S.C.C.A.N. 6460.

⁷⁵ *Id.* at 6462-63.

⁷⁶ Merges & Duffy, *supra* note 71, at 1039.

defense in an infringement suit. It was not until 1999 that Congress introduced an additional procedure for reexamination, *Inter Partes*.⁷⁷

a. Ex Parte Reexamination

Although Ex Parte reexamination was implemented prior to the enactment of the AIA, this particular administrative process still remains in effect under the AIA.⁷⁸ To request an Ex Parte reexamination to be conducted by the USPTO, anyone (including the patent owner or Director of the USPTO) must demonstrate the prior art consisting of other patents or printed publications raise a “substantial new question of patentability” which affects the patent’s validity.⁷⁹ The requirement that the challenge be “new” and “substantial” was intended to protect patent owners from having to argue elements of a claim that were already addressed and decided by the USPTO.⁸⁰ A party may request an Ex Parte reexamination at any time during the enforceability of the patent.⁸¹

As the title illustrates, Ex Parte reexamination proceedings involve only the patent owner and the USPTO.⁸² If a third party was the requester, they are generally precluded from further involvement.⁸³ This approach allows for the proceedings to resemble ordinary patent prosecution. However, the reexamination is conducted before a panel of three experienced examiners, whereas the initial patent prosecution was completed by a single examiner.⁸⁴

⁷⁷ *Id.*

⁷⁸ Fish & Richardson P.C., *Ex Parte Reexamination*, <http://fishpostgrant.com/ex-parte-reexamination/> (last accessed Mar. 15, 2015).

⁷⁹ 35 U.S.C. §§ 301-03.

⁸⁰ 1980 U.S.C.C.A.N. at 6466.

⁸¹ Fish & Richardson P.C., *Ex Parte Reexamination*, <http://fishpostgrant.com/ex-parte-reexamination/> (last accessed Mar. 15, 2015).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

The reexamination process ends when the Director of the USPTO issues a “certificate canceling any claim of the patent finally determined to be unpatentable, confirming any claim of the patent determined to be patentable, or incorporating in the patent any proposed amended or new claim determined to be patentable.”⁸⁵ Any canceled claim is held void in its entirety, removing the claim from the patent.⁸⁶ If the claim’s validity is confirmed, it retains its legal status and is entitled to a presumption of validity.⁸⁷ However, any party (including the party whom requested the reexamination) may further challenge the patent’s validity in court.⁸⁸

b. Inter Partes Reexamination

Inter Partes reexamination was introduced by Congress in 1999 under the assumption “volumes of lawsuits in district courts will be reduced if third parties can be encouraged to use reexamination by giving them an opportunity to argue their case for patent invalidity in the USPTO.”⁸⁹ To request an Inter Partes reexamination be conducted by the USPTO, a third party must demonstrate a substantial new question of patentability affecting any claim of the patent.⁹⁰ In contrast to an Ex Parte reexamination proceeding, the third party may or may not provide support for the challenge through other patents or printed publication.⁹¹ Thus, a third party had the opportunity to challenge the validity of a patent without asserting any evidentiary basis for the challenge.

⁸⁵ 35 U.S.C. § 307(a) (2012).

⁸⁶ ROBERT PATRICK MERGES & JOHN FITZGERALD DUFFY, PATENT LAW AND POLICY: CASES AND MATERIALS, LEXISNEXIS, at 1041 (2013).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ H.R. REP. 106-464, at 133 (1999).

⁹⁰ Pre-AIA 35 U.S.C. § 312(a).

⁹¹ *Id.*

The system for Inter Partes reexamination was initially ignored by most, but was gaining momentum before the enactment of the AIA in 2011.⁹² The AIA replaces Inter Partes reexamination with a new Inter Partes review procedure.⁹³

ii. Reexamination post-AIA

The AIA sought to accelerate the trend towards administrative review of patent validity decisions.⁹⁴ It created five new types of USPTO procedures involving patents: Post-Grant Review; modified Inter Partes Review; Supplemental Examination; transitional Post-Grant Review for business method patents; and Derivation Proceedings.⁹⁵ In addition, Ex Parte Reexamination also remains in effect, resulting in six available procedures for reexamination. Under the AIA, Post-Grant Review and the modified Inter Partes Review constitute the most important additions.⁹⁶

a. Post-Grant Review

As of September 16, 2012, the AIA provides third parties with an opportunity to challenge a patent's validity by a Post-Grant Review.⁹⁷ Congress has expressed its hope that Post-Grant Review will be embraced as a viable alternative to the traditional Ex Parte Reexamination proceedings implemented in 1980.⁹⁸ This new procedure allows anyone – patent owner or third party – to request a review of a patent that was issued following the AIA's enactment in 2011. The challenger may “request to cancel as unpatentable [one] or more claims

⁹² ROBERT PATRICK MERGES & JOHN FITZGERALD DUFFY, *PATENT LAW AND POLICY: CASES AND MATERIALS*, LEXISNEXIS, at 1046 (2013).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Eric S. Walters & Colette R. Verkuill, *Patent Litigation Strategy: The Impact of the America Invents Act and the New Post-grant Procedures*, Practical Law Company (2012).

⁹⁸ Eric S. Walters & Colette R. Verkuill, *Patent Litigation Strategy: The Impact of the America Invents Act and the New Post-grant Procedures*, Practical Law Company (2012).

of a patent on any ground that could be raised’ in a district court proceeding.”⁹⁹ Such grounds permit the introduction of evidence pertaining to on-sale activities, public uses, and prior-filed but not-yet issued patents.¹⁰⁰ In addition, the challenger may present evidence speaking to the issue of enablement.¹⁰¹

For a third party to properly challenge a patent’s validity by Post-Grant Review, the challenged claims of the patent must have an effective filing date of March 16, 2013 or later, and the third party must file the Post-Grant Review petition within nine months after the issue date of the patent.¹⁰² The decision whether to initiate a Post-Grant Review proceeding rests solely with the Director of the USPTO.¹⁰³ The Director must determine that the information presented in the petition demonstrates that it is more likely than not that at least one of the claims challenged is unpatentable.¹⁰⁴ This determination may also be satisfied by a showing that the petition raises a novel or unsettled legal question that is important to other patents or patent applications.¹⁰⁵

The AIA has envisioned a focused discovery process to be associated with Post-Grant Review.¹⁰⁶ Meaning, “Discovery shall be limited to evidence directly related to factual assertions advanced by either party in the proceeding.”¹⁰⁷ In addition, sanctions have been developed for

⁹⁹ Leahy-Smith America Invents Act §321 (2011) (amending §35 U.S.C. §282(b)).

¹⁰⁰ ROBERT PATRICK MERGES & JOHN FITZGERALD DUFFY, PATENT LAW AND POLICY: CASES AND MATERIALS, LEXISNEXIS, at 1047 (2013).

¹⁰¹ *Id.*

¹⁰² Eric S. Walters & Colette R. Verkuill, *Patent Litigation Strategy: The Impact of the America Invents Act and the New Post-grant Procedures*, PRACTICAL LAW COMPANY (2012).

¹⁰³ ROBERT PATRICK MERGES & JOHN FITZGERALD DUFFY, PATENT LAW AND POLICY: CASES AND MATERIALS, LEXISNEXIS, at 1048-49 (2013).

¹⁰⁴ *Id.* at 1049.

¹⁰⁵ *Id.*

¹⁰⁶ ROBERT PATRICK MERGES & JOHN FITZGERALD DUFFY, PATENT LAW AND POLICY: CASES AND MATERIALS 1049 (6th ed. 2013).

¹⁰⁷ 35 U.S.C. § 326(a)(5) (2011).

the likelihood a party to a Post-Grant Review misuses discovery “to harass or to cause unnecessary delay or an unnecessary increase in the cost of the proceeding.”¹⁰⁸

In general, the goal is for the USPTO to reach a final decision in a Post-Grant Review proceeding within one year of the petition’s approval by the Director.¹⁰⁹ In most cases, the projected one year timeline is decidedly more efficient and quicker than a validity challenge raised in court. This new, time-limited, Post-Grant Review of a patent has the ability to improve patent quality and restore confidence in the presumed validity of an issued patent.¹¹⁰

b. Inter Partes Review

As of September 16, 2012, the AIA provides third parties with an additional opportunity to challenge a patent’s validity by Inter Partes Review.¹¹¹ Similar to a Post-Grant Review, an Inter Partes Review allows anyone – patent owner or third party – to request a review of a patent that was issued following the AIA’s enactment in 2011.¹¹² The requestor in an Inter Partes Review must show there is a “reasonable likelihood that the request would prevail with respect to at least [one] of the claims challenged.”¹¹³

Inter Partes Review proceedings are comparable to a trial, including limited discovery, declarations, and hearings.¹¹⁴ However, the evidence presented is restricted to only patents and printed publications.¹¹⁵ For a third party to properly challenge a patent’s validity by Inter Partes

¹⁰⁸ *Id.*

¹⁰⁹ ROBERT PATRICK MERGES & JOHN FITZGERALD DUFFY, PATENT LAW AND POLICY: CASES AND MATERIALS 1049 (6th ed. 2013).

¹¹⁰ *Id.* at 1048.

¹¹¹ USPTO, AMERICA INVENTS ACT: EFFECTIVE DATES, *available at* http://www.uspto.gov/sites/default/files/aia_implementation/aia-effective-dates.pdf (Oct. 5, 2011).

¹¹² ROBERT PATRICK MERGES & JOHN FITZGERALD DUFFY, PATENT LAW AND POLICY: CASES AND MATERIALS 1050 (6th ed. 2013).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 1051.

review, it must be nine months from the patent's issue date, or the date of termination of a Post-Grant Review, if one exists, has been instituted.¹¹⁶ The later of the two dates will dictate when the third party may initiate an Inter Partes review.¹¹⁷

IV. Hybrid Potential under the AIA

Several intellectual property rights have the potential to protect the same intellectual property or the varying aspects of the same intellectual property.¹¹⁸ It is common practice to seek and obtain patents for the portion of a technology that is amenable to patent protection, while maintaining related technological information in confidence as a trade secret.¹¹⁹ For many inventors, patents are the centerpiece and more important than other forms of protection.¹²⁰ However, trade secrets in particular, are very valuable to “cover the additional subject matter; strengthen the exclusivity; invoke the additional remedies in litigation; and serving as backup” if a patent is found to be invalid.¹²¹

Despite the artificial incompatibility of patents and trades secrets – one requiring disclosure and the other nondisclosure – acquiring multiple forms of protection surrounding an invention proves desirable. A large majority of research and development data and results, and collateral know-how, cannot and need not be included in a patent application. Therefore, any

¹¹⁶ ERIC S. WALTERS & COLETTE R. VERKUIL, *PATENT LITIGATION STRATEGY: THE IMPACT OF THE AMERICA INVENTS ACT AND THE NEW POST-GRANT PATENT PROCEDURES*, in PRACTICAL LAW COMPANY (2012).

¹¹⁷ *Id.*

¹¹⁸ Karl F. Jorda, *The Foulston Siefkin Lecture: Patent and Trade Secret Complementariness: An Unsuspected Synergy*, 48 WASHBURN L.J. 1 (2008).

¹¹⁹ *See id.* at 11.

¹²⁰ *Id.* at 13.

¹²¹ *See id.*

information that is not required to be disclosed in a patent application should be maintained as a trade secret.

It is commonly argued that due to the “best mode” requirement, trade secret protection cannot coexist with patent protection; an inventor must disclose in the patent specification the best mode known of carrying out the claimed invention.¹²² However, this argument can be found to be a misconception. The best mode requirement applies only at the time of the application’s filing; only to the knowledge of the inventor(s); and only to the claimed invention.¹²³ Consequently, any developments to the invention made after the date of the patent application’s filing does not require disclosure. For example, an inventor faced with options A, B, and C with respect to a particular feature of the invention concludes, at the time of filing, A is the best mode and discloses it as so.¹²⁴ The inventor may subsequently determine that either B or C is a better mode than A.¹²⁵ However, this change in perspective will not later invalidate the patent and thus, may keep the “better” mode as a trade secret.

The AIA created new procedures for addressing patent invalidity disputes. These procedures offer newly established opportunities for third parties to challenge patents and for a patent owner to strengthen their intellectual property portfolio. Of the numerous procedures to be developed under the AIA, Post-Grant Review by the Patent Trial and Appeal Board (“PTAB”) and Inter Partes review introduce the greatest ground for a hybrid trade secret and patent protection approach.

¹²² 35 U.S.C. § 112 (2012).

¹²³ Jorda, *supra* note 118, at 23.

¹²⁴ Arnold B. Silverman, *Best Mode Disclosure – Comply or Invalidate Your Patent*, J. MINS., Dec. 1994, at 61, 61.

¹²⁵ *Id.*

A. Suggested Approach

As an approach to hybrid trade secret and patent protection, the invention is categorized into two different segments. One of the segments is protected by patent, and the other segment is protected by maintaining it as a trade secret.¹²⁶ In certain scenarios, patent invalidity due to ineligible subject matter can be avoided if the invention is segmented as suggested above. By including only the subject matter that fulfills 35 U.S.C. 101 in the patent, and protecting the information that does not as a trade secret, the invention has the potential to be protected under both patent law and trade secret law. There is also a great potential for protection of improvements to a patented invention as trade secrets.

B. Cases Illustrating the Potential for Hybrid Protection

Prior to the enactment of the AIA in 2012, the potential for hybrid protection had already been demonstrated in several cases, most notably Celeritas Techs. v. Rockwell Int'l Corp., in 1998,¹²⁷ and C&F Packing Co. v. IBP, Inc., in 2000.¹²⁸ Both cases were decided by the Court of Appeals for the Federal Circuit, the only appellate court within the United States' judicial system responsible for hearing all cases concerning patent and trade secret disputes. In addition, in Wyeth v. Natural Biologics, Inc., the Court of Appeals for the Eight Circuit also took notice of the complimentary nature of trade secrets and patents.¹²⁹ Subsequent to the AIA's enactment,

¹²⁶ Susan Perng Pan, *Hybrid Use of Trade Secret and Patent Protection in Green Technology*, SUGHRUE (2010), <http://www.sughrue.com>.

¹²⁷ 150 F.3d 1354, 1355 (Fed. Cir. 1998).

¹²⁸ 224 F.3d 1296, 1300 (Fed. Cir. 2000).

¹²⁹ See 395 F.3d 897, 899 (8th Cir. 2005).

hybrid protection was again demonstrated in *Ass’n for Molecular Pathology v. Myriad Genetics, Inc.*, decided by the Supreme Court in 2013.¹³⁰

i. Celeritas Techs. v. Rockwell Int’l Corp.¹³¹

In this case, Celeritas Technologies Limited (“Celeritas”) held a patent, U.S. Patent 5,386,590 (‘590 Patent), for an apparatus capable of increasing the rate of data transmission over analog cellular telephone networks.¹³² The ‘590 Patent indicated that conventional analog cellular communications systems suffer from noise that the listener hears as a high frequency hiss.¹³³ To combat this noise, analog networks boost the high frequency components of the transmitted signal, such as the speaker’s voice, and then decrease those components at the receiving end.¹³⁴ However, the increase and decrease of the components significantly impairs the transmission of data across the network.¹³⁵ The ‘590 Patent claimed an apparatus that counteracts the adverse effects by de-emphasizing the data signal before presenting to the cellular network.¹³⁶

In September 1993, Celeritas met with representatives from Rockwell International Corporation (“Rockwell”) to demonstrate the de-emphasis technology.¹³⁷ The parties entered into a non-disclosure agreement (“NDA”), which covered the subject matter of the meeting and provided that Rockwell “shall not disclose or use any Propriety Information (or any derivative thereof) except for the purpose of evaluation the prospective business arrangements between

¹³⁰ 133 S. Ct. 2107, 2115 (2013).

¹³¹ 150 F.3d at 1354.

¹³² *Celeritas Techs., Ltd. v. Rockwell Int’l Corp.*, 150 F.3d 1354 (Fed. Cir. 1998).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Celeritas*, 150 F.3d at 1356.

Celeritas and Rockwell.”¹³⁸ In March 1994, Rockwell informed Celeritas it would not license the use of the technology and began its own development project to incorporate Celeritas’ de-emphasis technology into its modem chip sets.¹³⁹ Subsequently, Celeritas sued Rockwell in September 1995, alleging breach of contract, misappropriation of trade secrets, and patent infringement.¹⁴⁰

The United States Court of Appeals for the Federal Circuit affirmed the district court’s holding in part, and reversed in part.¹⁴¹ In affirmation, the court found that Celeritas was entitled to damages based on their contract claim encompassing the NDA between the parties.¹⁴² In reversal, the court found the patent held by Celeritas was anticipated by a published article, and therefore invalidated the claims.¹⁴³ Thus, if Celeritas had relied only on its patent, it would have received nothing because its patent was found invalid.¹⁴⁴ However, with the NDA, it received millions for its creative work.¹⁴⁵

ii. C&F Packing Co. v. IBP, Inc.¹⁴⁶

Commonly referred to as “the Pizza Hut case,”¹⁴⁷ C&F Packing Company (“C&F”) had developed and patented a process for freezing precooked sausage to be used as pizza toppings.¹⁴⁸ “Since the early 1970s, C&F had supplied uncooked sausage to pizza vendors, including Pizza

¹³⁸ *Id.* at 1357.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 1362.

¹⁴² *Id.*

¹⁴³ *Celeritas*, 150 F.3d at 1362.

¹⁴⁴ IEEE Xplore, *The importance of having a non-disclosure agreement* (Aug. 6, 2002), <http://ieeexplore.ieee.org/xpl/login.jsp?tp=&arnumber=844392&url=http%3A%2F%2Fieeexplore.ieee.org%2Fiel5%2F51%2F18309%2F00844392.pdf%3Farnumber%3D844392>.

¹⁴⁵ *Id.*

¹⁴⁶ 224 F.3d 1296 (Fed. Cir. 2000).

¹⁴⁷ Karl F. Jorda, *The Foulston Siefkin Lecture: Patent and Trade Secret Complementariness: An Unsuspected Synergy*, 48 Washburn L.J. 1 (Fall 2008).

¹⁴⁸ 224 F.3d at 1299.

Hut.¹⁴⁹ Over time, C&F identified a need for national distribution of precooked sausage for pizza toppings¹⁵⁰ and obtained a patent, U.S. Patent 4,800,094 ('094 Patent), for the process of making and freezing precooked sausage.¹⁵¹ After the patent's issuance, C&F continued to improve its process and kept the improvements as trade secrets.¹⁵²

In 1985, Pizza Hut reached an agreement with C&F to buy the precooked sausage on the condition that C&F disclose its process to several other Pizza Hut suppliers, as to assure back-up suppliers would be available to the pizza franchise.¹⁵³ In exchange, Pizza Hut promised to purchase a large amount of precooked sausage from C&F.¹⁵⁴ Subsequently, C&F entered into written confidentially agreements with the entities and disclosed its process.¹⁵⁵ By early 1986, Pizza Hut's other suppliers had learned how to duplicate C&F results.¹⁵⁶

In 1989, Pizza Hut entered into discussions with IBP, one of Pizza Hut's largest suppliers of meat products other than sausage, about the purchase of precooked sausage.¹⁵⁷ Pizza Hut further provided IBP with a "specification and formulation" for sausage toppings.¹⁵⁸ By early 1991, Pizza Hut was buying precooked sausage topping from IBP."¹⁵⁹ C&F filed suit against IBP for infringement of the '094 Patent, and later amended the complaint to add charges against

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ 224 F.3d at 1299.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 1300.

¹⁵⁸ 224 F.3d at 1300.

¹⁵⁹ *Id.*

Pizza Hut.¹⁶⁰ C&F alleged fraud, breach of fiduciary duty, unfair competition, unjust enrichment, tortious interference with business expectancy, and trade secret misappropriation.¹⁶¹

The United States Court of Appeals for the Federal Circuit made two findings. First, on summary judgment, C&F's patents were invalid because the invention had been on sale more than one year before the filing date, pursuant to pre-AIA 35 U.S.C. §102(b).¹⁶² Second, that C&F possessed valuable and enforceable trade secrets that had been misappropriated.¹⁶³ The court ordered Pizza Hut to pay \$10.9 million to C&F, finding C&F had kept the process confidential and supplied sufficient evidence that its process was a trade secret.¹⁶⁴ Such evidence included written secrecy agreements with suppliers and employees.¹⁶⁵

iii. Wyeth v. Natural Biologics, Inc.¹⁶⁶

Wyeth manufactures and sells Premarin, a medication prescribe for the treatment of menopause symptoms.¹⁶⁷ Premarin was developed as the hormone replacement therapy drug derived from a natural source; natural conjugated estrogens.¹⁶⁸ Utilizing a process referred to as the "Brandon Process," Wyeth was able to produce the natural conjugated estrogens in bulk.¹⁶⁹ The Brandon Process was held by Wyeth as a trade secret, not "generally known or readily ascertainable."

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ 224 F.3d at 1300.

¹⁶⁴ *Id.* at 1301.

¹⁶⁵ *Id.*

¹⁶⁶ 395 F.3d 897 (8th Cir. 2005).

¹⁶⁷ 395 F.3d at 899.

¹⁶⁸ *Id.* at 898.

¹⁶⁹ *Id.* at 899.

Wyeth brought suit against Natural Biologics, Incorporated and Natural Biologics, LLC (“Natural Biologics”) claiming trade secret misappropriation concerning the Brandon Process.¹⁷⁰ Natural Biologics claimed to have independently developed its process through the review of Wyeth’s expired patents, scientific literature, and waste manifests from Wyeth’s manufacturing facility, which revealed the names and volumes of chemicals used.¹⁷¹ It was also determined Natural Biologics communicated with a former Wyeth chemist.¹⁷²

The United States Court of Appeal for the Eighth Circuit affirmed the district court’s holding that Natural Biologics misappropriated Wyeth’s trade secret process and permanently enjoined it from using the process further.¹⁷³ Natural Biologics’s first argument was that the Brandon Process was not a trade secret and Wyeth failed to adequately secure the technical information.¹⁷⁴ The court found the Brandon Process was in fact a trade secret, emphasizing that “only reasonable efforts, not all conceivable efforts, are required to protect the confidentially.”¹⁷⁵

Natural Biologics also asserted the district court abused its discretion by issuing a permanent injunction against all activity related to the technicalities of the Brandon Process.¹⁷⁶ The court recognized that “misappropriation of a trade secret constitutes irreparable harm that, under certain circumstances, warrants injunctive relief to prevent the misappropriator from selling or manufacturing the product embodying the secret.”¹⁷⁷ The court supported the district court’s reasoning that a permanent injunction was appropriate because in its decades-long

¹⁷⁰ *Id.* at 898.

¹⁷¹ 395 F.3d at 899.

¹⁷² *Id.*

¹⁷³ *Id.* at 903.

¹⁷⁴ *Id.* at 898-99, 903.

¹⁷⁵ *Id.* at 900 (quoting *LaserMaster Corp. v. Sentinel Imaging*, 931 F. Supp. 628, 635 (D. Minn. 1996)).

¹⁷⁶ *Id.*

¹⁷⁷ 395 F.3d at 902.

history, no other competitor had been able to replicate the Brandon Process through acceptable means, such as reverse engineering and experimentation.¹⁷⁸ Thus, the economic value attributed to the Brandon Process, acquired by Natural Biologics through illegal means, warranted a permanent injunction.¹⁷⁹

iv. Ass’n for Molecular Pathology v. Myriad Genetics, Inc.¹⁸⁰

Myriad Genetics Incorporated (“Myriad”) discovered the precise location and sequence of two human genes, BRCA1 and BRCA2 whose mutations can substantially increase the risks of breast and ovarian cancer.¹⁸¹ Myriad obtained several patents based upon this discovery, U.S. Patents: 5,747,282 (‘282 Patent), 5,693,473 (‘473 Patent), and 5,837,492 (‘492 Patent).¹⁸²

Before Myriad’s discovery of the BRCA1 and BRCA2 genes, scientist were aware heredity was a critical component in evaluating a woman’s risk of developing breast and ovarian cancer, but they did not know the specific genes.¹⁸³ Upon discovering the genes associated with breast and ovarian cancer, Myriad was able to develop medical tests to screen for mutation within the BRCA1 and BRCA2 genes.¹⁸⁴ Myriad solidified its position as the only entity providing BRCA testing by issuing cease and desist letters to anyone utilizing the genes in genetic screenings.¹⁸⁵ However, years later, several entities filed suit against Myriad declaring

¹⁷⁸ *Id.* at 902 (citing MINN. STAT. § 325C.02 (1986)).

¹⁷⁹ *See Id.* at 902.

¹⁸⁰ 133 S. Ct. 2107 (2013).

¹⁸¹ 133 S. Ct. at 2110-11.

¹⁸² *Id.* at 2110-11.

¹⁸³ *Id.* at 2111.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 2114.

the relevant patents invalid.¹⁸⁶ The petitioners included patients, advocacy groups, and medical professionals.¹⁸⁷

The United States Supreme Court reversed the Federal Circuits judgment that the patents were valid, thus invalidating the claims. The Court initially reiterated that “Laws of nature, natural phenomena, and abstract ideas are not patentable,”¹⁸⁸ which otherwise would “inhibit future innovation premised upon them.”¹⁸⁹ However, the Court recognized the rule against patents on naturally occurring things is not without limits.¹⁹⁰ If a patented invention claims any “new or useful composition of matter” instead of merely claiming a naturally occurring phenomena, the patents may be found valid regardless.¹⁹¹ The Court held that although Myriad was the first to locate the BRCA1 and BRCA2 genes, the discovery itself, does not render the BRCA genes new compositions of matter that are patent eligible.¹⁹² Therefore, the mere discovery of a naturally occurring phenomena without employing some form of artificial manipulation cannot obtain patent protection.¹⁹³

The Court went on to distinguish that method claims within a patent are not met with such opposition as claims towards a composition.¹⁹⁴ Had Myriad created an innovative method of manipulating genes while searching for the BRCA1 and BRCA2 genes, the subject matter would have likely been found patentable.¹⁹⁵ In the case before the Court, the processes used by

¹⁸⁶ 133 S. Ct. at 2114.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 2116, quoting *Mayo*, 132 S. Ct. 1289.

¹⁸⁹ *Id.* at 2116 (quoting *Mayo Collaborative Svcs. v. Prometheus Labs., Inc.*, 132 S. Ct. 1289, 1293 (2012)).

¹⁹⁰ *Id.* at 2116.

¹⁹¹ 133 S. Ct. at 2116.

¹⁹² *Id.* at 2117.

¹⁹³ *See id.* at 2118.

¹⁹⁴ *Id.* at 2119.

¹⁹⁵ *See id.*

Myriad were well known and understood by geneticists and offered no new information deserving of patent protection.¹⁹⁶

V. Conclusion

“Trade secret and patent coexistence is well-established, and the two are in harmony because they serve different economic and ethical functions.”¹⁹⁷ Patents are entitled to 20 years of protection from the date of issue, granted the patent owner maintains the maintenance fees.¹⁹⁸ However, this 20 year term may be significantly truncated if the patent claims are held invalid either in a court proceeding or USPTO proceeding.¹⁹⁹ In contrast, trade secret provides indefinite protection if the proprietary information is concealed well, which proves to be more difficult in practice.²⁰⁰

By combining the protection of both trade secrets and patents, an inventor can greatly expand the avenues of redress should the technology be infringed or found invalid. Under both areas of law, the patent owner may seek both monetary compensation and injunctive relief. Thus, even if the patent is held invalid by the court or USPTO, the patent owner may still assert trade secret misappropriation to obtain compensation.

As several of the cases discussed prior illustrate, “dual or multiple protection for intellectual property is not only possible but essential to exploit the intellectual property overlap

¹⁹⁶ 133 S. Ct. at 2119-20.

¹⁹⁷ Karl F. Jorda, *The Foulston Siefkin Lecture: Patent and Trade Secret Complementariness: An Unsuspected Synergy*, 48 WASHBURN L.J. 1, **19** (Fall 2008), quoting DONALD S. CHISUM & MICHAEL A. JACOBS, UNDERSTANDING INTELLECTUAL PROPERTY LAW § 3B(1) (M. Bender 1992).

¹⁹⁸ 35 U.S.C. § 154 (2015).

¹⁹⁹ Jorda, *supra* note 199, at 20.

²⁰⁰ *Id.*

and provide a fallback position.”²⁰¹ Furthermore, when applying this approach to technology that is governed under the AIA, inventors are establishing additional security that should their patent be found invalid, the invention may still have economic values through trade secrets.

²⁰¹ *Id.*

The Internet and Access to Child Pornography: A New (Techie)
Generation of Defendants Requires a New (Individualized) Application
of the Federal Sentencing Guidelines

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Abstract

The younger generations Y and Z have a unique and comfortable relationship with the Internet and like technologies. Upon understanding how youth access online material, the question arises as to whether the Federal Sentencing Guidelines should clarify sentencing procedure to demand a detailed, individualized, and well-supported sentence for every child pornography defendant. Each sentence should give great weight to a defendant's relationship with technology, how he discovered the illegal material, and how he used it after acquisition. In addition, courts should consider his personal characteristics, the circumstances surrounding the offense conduct, and his associated culpability level. Simply put, sentencing courts should determine an individualized sentence for child pornography *offenders* versus child pornography *offenses*.

I address this question by first introducing the reader to a real victim-defendant, whose life was effectively thrown away at sentencing. Next, I address the Internet and the related technological landscape of today, and how generations Y and Z are affected. Additionally, I demonstrate how Congress and the Sentencing Commission have battled to determine

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appropriate sentences for child pornography offenses, and offer an introduction to the federal Sentencing Guideline's current framework for child pornography offenses and enhancements. Next, I reveal a trend in sentencing courts across the country to work with and not against child pornography defendants who, based on their personal characteristics and the circumstances surrounding their offense, necessitate an individualized non-guideline sentence. Finally, I will briefly address arguments against an individualized, and inevitably more lenient sentencing structure for child pornography defendants, and end with a conclusion supporting an individualized sentencing procedure that takes into account the role of technology in the lives of today's youth, and the role of technology in the lives of future child pornography defendants.

I. Introduction

From the outside, Jeremy Crown² looked like an average kid. Born and raised with the world at their fingertips by way of technology, Crown and his generation had unrestricted access to material on the Internet, both legal and illegal. Generations Y and Z³ grew up with the idea of anonymity online with Peer-to-Peer (P2P) file sharing and torrent technologies, e-mail, instant messaging, chat rooms, etc. Anything the young people of generations Y and Z wanted, they could access safely from behind a computer screen.

Crown, however, was *not* an average young man. He dealt with many illnesses including brain and spinal malformations throughout his young life, some of which required multiple surgeries and continued maintenance. In addition to his physical health problems, Crown's mental development was slowed; he was diagnosed with attention deficit disorder, and placed on a separate academic track than his classmates and friends. His health complications also caused difficulty in distinguishing events and associating things temporally.

As a young, sick, and vulnerable boy, he became the victim of sexual abuse beginning at age eight. An older neighborhood boy forced him to perform sexual acts in the woods. The abuse lasted for months, but Crown did not tell anyone because of threats against him and his family. After the abuse, as he settled into elementary school and began making new friends, his parents divorced and Crown suffered from depression.

As he moved forward with his childhood and attended middle school, he remembered having a considerably normal life, having friends and playing computer and video games. He had a familiarity with technology that drew him to these types of games; he also liked video and

² Jeremy Crown is based on a true person, whose name has been changed for privacy and protection, as his case is still ongoing.

³ Generations Y and Z are considered to be people born in the 1980's to 2000's, and after the year 2000, respectively.

computer games because everything was make-believe and no one got hurt. One day while Crown and a group of school friends were using a computer, his school friends explored the Internet and introduced Crown to online adult pornography. Crown quickly began using his computer and online capabilities to look at adult and ultimately child pornography when he was only thirteen years old. His friends, however, later ostracized him and Crown found himself as a young, physically and developmentally challenged youth, without many friends, a sexual abuse victim, and alone with his computer.

As can be said about many (if not all) young people of generations Y and Z, Crown was comfortable with technology and was skilled with various Internet programs that allowed him to look at websites, visit chat rooms, send emails, and share files on a Peer-to-Peer network – all from the safety of his own home. Looking at online child pornography became an attractive activity for Crown. First, he found child pornography was a way of coping with his own trauma and identified with the children he saw; and second, he discovered he was meeting a network of people online who were also interested in the same pornographic material as he was. With the Internet at his fingertips, Crown made friends online and amassed a collection of child pornography images and videos that he gathered and traded. For once he had somewhere to turn when he was alone, he had friends online, he had a collection of material that others wanted, he felt important.

Over a period of approximately nine years, Crown continued his Internet child pornography habits, which transformed from a deviant interest into a compulsion and an addiction. He had amassed a very large collection of child pornography. During these years, Crown met his current and long-term girlfriend online, he graduated high school, worked successfully at a minimum wage job, and was otherwise a contributing member of society.

In 2013, when Crown was twenty-one years old, his Internet-world came crumbling down when federal authorities arrested him on charges of possession, distribution, and receipt of child pornography.

Crown is now twenty-three years old. He has expressed unwavering acceptance of responsibility and knows that his actions were wrong. He knows he developed an addiction to online child pornography and needs mental health counseling; he said upon his arrest that he was glad police arrived because he had an addiction and he just wanted a normal life.

For the offense of trafficking in material involving exploitation of a minor, Crown's base offense level was eighteen with a guideline imprisonment range of approximately three to four years. After the Government applied nearly every sentence enhancement to Crown's offense conduct, his offense level increased to thirty-seven, and his guideline imprisonment range increased *five-fold* to approximately seventeen to twenty-two years. Crown was sentenced to seventeen and one half years imprisonment, and based on a plea agreement with the Government he lost the right to appeal any sentence of seventeen and one half years or less.

Nevertheless, his defense team is vigorously appealing his sentence on a miscarriage of justice theory. The defense asserts the sentencing judge did not adequately take into account several issues specific to Crown's personal life and the circumstances surrounding his offense, and the sentence does not accomplish the purposes of punishment. The issues the defense feels the Judge should have given more (and proper) weight to are: (1) his age at the onset of his pornography addiction; (2) his history as a sexual abuse victim; (3) his health conditions that have caused a lack of maturity, reasoning, and temporal associations; (4) his own family, and his long-time girlfriend's family as support; (5) psychological testing that shows he is not a danger

to the community and is amenable to treatment; and (6) polygraph testing that shows he has been truthful with the Government and has never touched a minor.

The issues in the Crown case illustrate only a few of the factors covered under § 3553(a) of the United States Sentencing Guidelines (USSG). These factors should be considered in determining a defendant's sentence, but the weight they are given is entirely subject to the discretion of the sentencing judge in light of the Supreme Court's decisions in *United States v. Booker* and *United States v. Fan Fan*, which held that the guidelines are only advisory, and not mandatory.⁴

The issue for Jeremy Crown and to be addressed in this article is, based on the relationship younger generations develop with the Internet and like technologies, and the wide variety of culpability levels between different offenders, whether the Guidelines should clarify sentencing procedure to demand a detailed, individualized, and well-supported sentence for every child pornography defendant. Or more simply, does the "techie" generation require an individualized sentencing structure?

I believe so. The current United States Sentencing Commission (Commission) Guidelines Manual mechanically applies enhancements to offense conduct that nullifies any personal circumstances of the defendant that act as mitigating factors. Despite having the same *offense*, mitigating personal characteristics are different in each *offender*. These characteristics develop throughout a person's life depending on their upbringing and social setting, which, for younger generations involves unrestricted Internet access. These character differences separate one offender from another in their level of culpability and ability to reform, and it separates offenders from generations Y and Z from offenders considered during the promulgation of the

⁴ *United States v. Booker*, 543 U.S. 220 (2005); *United States v. Fan Fan*, 543 U.S. 220 (2005); see 18 U.S.C.A. § 3553(a)(4).

Guidelines. Thus, moving forward and recognizing these differences, sentencing courts should determine an individualized sentence for child pornography *offenders* versus child pornography *offenses*.

This article addresses the question in the following format. Part I has introduced you to a real victim-defendant, whose life was effectively thrown away at sentencing because of behavior that began as an abused and sickly child, and whose online capabilities lead him to commit his illegal behavior on a large scale. Part II contains an introduction into the Internet and the related technological landscape of today, and how generations Y and Z are affected. Part III reveals how Congress and the Sentencing Commission have battled to determine appropriate sentences for child pornography offenses, and offer an introduction to the federal Sentencing Guideline's current framework for child pornography offenses. Part IV illustrates a recent trend in sentencing courts across the country to work *with* and not *against* child pornography defendants who, based on their personal characteristics and the circumstances surrounding their offense, necessitate an individualized non-guideline sentence. Part V addresses the arguments against an individualized, and inevitably more lenient, sentencing structure for child pornography defendants. Finally, a brief conclusion and direction on moving forward is provided in Part VI.

II. The Internet and the “techie” generation as offenders *and* victims

To begin, there is a huge, illegal, and very real, child pornography industry on the Internet with at least 100,000 websites offering illegal material.⁵ As recently as 2013, “[a]pproximately 20% of all Internet pornography is child sexual abuse.”⁶ Child pornography

⁵ *Pornography industry is larger than the revenues of the top technology*, CY.TALK (Jan. 01, 2010), <http://blog.cytalk.com/tag/children-internet-pornography-statistics/>.

⁶ *Our Culture is Porn Culture (U.S. and International Figures)*, STOP PORN CULTURE, <http://stoppornculture.org/about/about-the-issue/facts-and-figures-2/>.

generated \$3 billion annually in 2004.⁷ Originally, a piece of child pornography was only available through physical images in print and obtained through the mail, and may have reached a few thousand people who purchased it; but with the speed and global reach of the Internet, such an image can quickly reach millions.⁸

It is important to understand, that with the ease children from Generations Y and Z use online technologies, children are not only victims, but they are the consumers of child pornography as well. Today's youngest generations are adding to what is known as a 'porn culture' in our country and around the world.⁹ In 2010, there were 244,661,900 Internet pornography websites in the United States, where "children as young as 11 years old are regularly accessing hardcore [] pornography."¹⁰ The average age for first exposure to Internet pornography is fourteen years old, and sixty-six percent of that exposure was unintentional (not actively seeking pornography while using the Internet).¹¹ Furthermore, "[f]ollowing first exposure, the largest consumer group of internet pornography is boys between the ages of 12-17."¹²

To put things into perspective, the porn industry (adult and child) in 2006, had "larger revenues than the top technology companies (Microsoft, Google, Amazon, eBay, Yahoo, Apple and Netflix) combined."¹³ Porn culture in America is a prevalent problem that does not foresee an end in a country whose citizens passively accept exposure to Internet pornography as the

⁷ *TopTenREVIEWS Releases Porn Industry Statistics*, TOPTENREVIEWS (FEB. 6, 2004), <http://www.toptenreviews.com/2-6-04.html>.

⁸ See Neal Kumar Katyal, *Criminal Law in Cyberspace*, 149 U. PA. L. REV. 1003, 1028 (2001).

⁹ *About Stop Porn Culture International*, STOP PORN CULTURE, <http://stoppornculture.org/about/about-stop-porn-culture-international/>.

¹⁰ *Pornography industry*, *supra* note 5; *Our Culture is Porn Culture*, *supra* note 6.

¹¹ Daniel Weiss, *The New Normal? – Youth Exposure to Online Pornography*, CITIZENLINK (Jan. 27, 2012), <http://www.citizenlink.com/2012/01/27/the-new-normal—youth-exposure-to-online-pornography/>.

¹² *Our Culture is Porn Culture*, *supra* note 6.

¹³ *Id.*

norm.¹⁴ With new generations of younger, tech-savvy kids, pornography will reach more and more young people with less and less effort.¹⁵ It is important to recognize that children and teens are the exploited victims of this crime. Nevertheless, it is equally important to understand that children and teens can also be the consumers of online illegal pornographic material, who have themselves fallen victim to the Internet and its all-too-available illegal content.

A. The Internet and related technologies

At the advent of the Internet, the child pornography market grew exponentially.¹⁶ “The Internet provides ground for individuals to create, access, and share child sexual abuse images worldwide at the click of a button.”¹⁷ Internet technologies including “websites, email, instant messaging/ICQ, Internet Relay Chat (IRC), newsgroups, bulletin boards, Peer-to-Peer networks, and social networking sites” have made access to illegal materials easier.¹⁸ The Internet and its related technologies have become the medium for child pornography offenders to discover, collect, trade, and sell images and videos, and also “to share their interests, desires, and experiences abusing children.”¹⁹ The easy availability of this illegal behavior allows for its normalization, and viewers become desensitized from the harm caused by their actions.²⁰

¹⁴ See Weiss, *supra* note 11.

¹⁵ See *Child Exploitation and Obscenity Section*, U.S. DEP’T OF JUST., <http://www.justice.gov/criminal/ceos/subjectareas/childporn.html>.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Child Exploitation and Obscenity*, *supra* note 15.

¹⁹ *Id.*

²⁰ *Id.*

A Ninth Circuit judge spoke to the idea that “the Internet—by rendering child pornography more accessible, affordable, and anonymously obtainable than in the past—has ‘facilitate[d].. *a new kind of crime.*’”²¹

One Internet technology that is at the focus of online child pornography offenses is Peer-to-Peer networks. A user downloads free software onto their computer, and upon being connected to the Internet a Peer-to-Peer connection allows that computer to link with other computers to share files.²² The Federal Bureau of Investigation cautions all users of Peer-to-Peer networks, and parents of young people using such networks, that “there is no age restriction for the use of Peer-to-Peer services, pornography of all types is easily accessible.”²³

The dramatic rise in significance of smartphones, social media, personal computers, and file sharing networks in America has transformed how children from generations Y and Z access information, news and media, and how they communicate both at school and at home.²⁴ Today and for future generations, the Internet provides the vehicle to explore both legal and illegal material online, and easily fall victim to the vices of the Internet.

B. Effect of Internet and other technologies on generations Y and Z

A sub-issue to the main question of how to individualize the current sentencing structure is whether the Internet and related technologies have a negative effect on the young, techie

²¹ *United States v. Apodaca*, 641 F.3d 1077, 1087 (9th Cir. 2011) (citing Andreas Frei et al., *Paedophilia on the Internet—A Study of 33 Convicted Offenders in the Canton of Lucerne*, 135 Swiss Med. Weekly 488, 492 (2005) (emphasis added)).

²² *Risks of Peer-to-Peer Systems, Scams & Safety*, FEDERAL BUREAU OF INVESTIGATION, <http://www.fbi.gov/scams-safety/peertopeer> (last visited April 4, 2015).

²³ *Id.*

²⁴ Chelsea Clinton and James P. Steyer, *Is the Internet hurting children?*, CNN (May 21, 2012, 10:04 AM), <http://www.cnn.com/2012/05/21/opinion/clinton-steyer-internet-kids/>.

generations Y and Z, and whether this effect is distinctive and more challenging than currently understood.

With generation Y in their teens to thirties and generation Z still being born, the research is still ongoing, but “in its early stages, it suggests that the Internet may actually be changing how our brains work.”²⁵ “Too much hypertext and multimedia content has been linked in some kids to limited attention span, lower comprehension, ... [and] greater risk for depression”²⁶ The brain-altering effect of technology and media changes “virtually everything from our thought processes . . . [to] how we feel about ourselves, our friends, and even strangers.”²⁷

A person’s identity is formed during their teen years, during a time of “identity exploration and experimentation.”²⁸ This time of identity formation naturally includes children making mistakes as they explore and experiment in forming their identity.²⁹ Over the last several decades as technology has become more prevalent in the lives of children, this mistake-ridden developmental period that used to be private and offline, now involves access to the Internet.³⁰ Consequently, this developmental period of children experimenting to form their individual identities has moved from a safe and private offline space, to an online space where everything becomes permanent in the digital record.³¹ Generations Y and Z are the ones now facing this issue that their every move – no matter how innocuous or experimental – is recorded and judged.³²

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *See id.*

³⁰ *See id.*

³¹ *Id.*

³² Generation Y is considered to be those born from the 1980’s to the 2000’s, and generation Z is considered to be from the 2000’s to present day; these generations are known for growing up with more and more technology facilitating free communication and limitless access to information online.

Author Marc Prensky created the term “digital native” in 2001, defining it as youth born into a world where “[c]omputers and handsets are becoming an extension of body and mind, creating a Cyborg-like population.”³³ Generations Y and Z are generally accepted as “digital natives . . . who were brought up during the digital age and are therefore familiarized with technology and the Internet” from birth, or from a very young age.³⁴ Accordingly, child pornography offenders who are digital natives might also be considered ‘Internet porn natives’ who are familiar with technology and where “exposure to online pornography might have reached a point where it can be characterized as normative among youth Internet users . . .”³⁵

i. Psychology and neuroscience illustrate differences between youth and adult thought process

There is a difference between youth and adults in maturity and rationality, as “children are in the process of growing up, both physically and mentally.”³⁶ A young person continues to form their individual identity as they age and as their brain develops.³⁷ Brain studies using magnetic resonance imaging (MRI) show that young people have biological differences in the frontal lobe causing a lack of self-control, as compared to adults.³⁸ Psychologists agree “adolescents are less able than adults to perceive and understand the long-term consequences of their acts, to think autonomously instead of bending to peer pressure or the influence of older

³³ Oliver Joy, *What does it mean to be a digital native?*, CNN (Dec. 8, 2012), <http://edition.cnn.com/2012/12/04/business/digital-native-prensky/>.

³⁴ Kyle Griffin, *What is a millennial?*, CultureCube (Sept. 30, 2014), <http://goculturecube.com/2014/09/30/millennials-101/>.

³⁵ Weiss, *supra* note 11.

³⁶ *The Rest of Their Lives, Life without Parole for Child Offenders in the United States, V: The Difference between Youth and Adults*, AMNESTY INTERNATIONAL HUMAN RIGHTS WATCH (Oct. 11, 2005), p.45, <https://www.hrw.org/sites/default/files/reports/TheRestofTheirLives.pdf>.

³⁷ *See id.* at 47-48.

³⁸ *Id.* at 47-49.

friends and acquaintances, and to control their emotions and act rationally instead of impulsively. All of these tendencies affect a child's ability to make reasoned decisions.”³⁹

“[B]iological distinctions between adults and children reveal that these differences occur along an age continuum . . . and the rate at which the adolescent brain acquires adult capabilities differs from individual to individual,” but it is known that the changes occur from puberty into adulthood.⁴⁰

It then follows that a young person accessing online child pornography is doing so with a difference in maturity, understanding, and overall brain development than someone who seeks out exploitive materials as an adult. According to the Guidelines, however, there is no difference in culpability between the two actions.

ii. Ability for youth to rehabilitate

Due to brain development and the formation of identities, “young offenders [are] excellent candidates for rehabilitation.”⁴¹ Young people are more able than adults “to learn new skills, find new values, and re-embark on a better, law-abiding life.”⁴²

Although children and adults may commit similar conduct crimes – such as downloading and viewing child pornography – “the culpability or blameworthiness of the offender” is different in adults and children based on the maturity and development of the brain.⁴³ While children can commit acts as criminally and morally reprehensible as those adults commit, “their blameworthiness is different by virtue of their immaturity,” and “[t]heir punishment should acknowledge that substantial difference.”⁴⁴ Adults have greater capacity to control their

³⁹ *Id.* at 45.

⁴⁰ *Id.* at 48.

⁴¹ *The Rest of Their Lives – V: The Difference between Youth and Adults*, supra note 36, at 45.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 45.

impulses, whereas children don't reason through their choices or consider long-term consequences.⁴⁵ Sentencing judges should thus give appropriate weight to a young defendant's individual culpability and potential for rehabilitation in determining a sentence that is not greater than necessary to achieve the purposes of punishment.

iii. Desensitization and the mental health of defendants who look at child pornography at an early age

Desensitization occurs when a person becomes emotionally insensitive to a stimulus after repeated exposure to it. It is usually understood in the context of youth desensitization to violence through TV, movies, and video games. The idea is also applicable in the context of desensitization to the illegality of child sexual abuse in child pornography.

Viewers of child pornography can become desensitized "to the pathology of sexual abuse or exploitation of children, so that it can become acceptable to the viewer."⁴⁶ There are several ways this desensitization occurs, one being through "pseudo-child pornography," which is legal adult pornography with participants over the age of eighteen, but the actors are depicted as underage.⁴⁷ Adult pornography of this type may legitimize and normalize true child pornography, and desensitize users to illegal material.⁴⁸ Once a user is desensitized to viewing the material, they do not recognize or appreciate "the pain and damage that the child victims experience."⁴⁹ By lacking the understanding of how the children are being victimized, consumers of child pornography can develop "a preference for increasingly deviant and severely

⁴⁵ *Id.*

⁴⁶ NANCY E. DOWD, DOROTHY G. SINGER, ROBIN FRETWELL WILSON, *HANDBOOK OF CHILDREN, CULTURE, AND VIOLENCE* 74 (2006).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

abusive forms of child pornography.”⁵⁰ Internal inhibitions are also undermined when a user becomes desensitized to child pornography; this can result in continued and escalated viewing of illicit materials, or even acting out desires to victimize children themselves.⁵¹

In the context of young offenders, however, it is shown that they can rehabilitate, they can learn new skills, find new values, and avoid the escalation from viewer to abuser.⁵² The desensitization young people who view child pornography offenders experience can be cured, and the sentencing judge, in the interest of fairness, should consider this potential for rehabilitation in determining an individualized sentence.

iv. Internet to prison pipeline

The school to prison pipeline is “a disturbing national trend wherein children are funneled out of public schools and into the juvenile and criminal justice systems.”⁵³ In schools, “student behavior is criminalized, children are treated like prisoners and, all too often, actually end up behind bars.”⁵⁴ Often young offenders have mental or physical disabilities, and histories of abuse, poverty, or neglect.⁵⁵ Instead of being given counseling and re-education, offenders of even minor infractions are pushed into the criminal justice system.⁵⁶

The school to prison pipeline is typically understood in the context of a system of racist oppression.⁵⁷ However, the concept is also applicable in the arena of Internet crimes committed

⁵⁰ *Id.*

⁵¹ DOWD, *supra* note 46.

⁵² *The Rest of Their Lives*, *supra* note 36, at 45.

⁵³ *School to Prison Pipeline*, AMERICAN CIVIL LIBERTIES UNION, <https://www.aclu.org/school-prison-pipeline> (last visited March 8, 2016).

⁵⁴ Molly Kniefel, *The School-to-Prison Pipeline: A Nationwide Problem for Equal Rights*, ROLLINGSTONE (Nov. 7, 2013), <http://www.rollingstone.com/music/news/the-school-to-prison-pipeline-a-nationwide-problem-for-equal-rights-20131107>.

⁵⁵ *Id.*; *School to Prison Pipeline*, *supra* note 53.

⁵⁶ *See Schools to Prison Pipeline*, *supra* note 53.

⁵⁷ Mychal Denzel Smith, *The School-to-Prison Pipeline starts in Preschool*, THE NATION (Mar. 28, 2014, 1:46 PM), <http://www.thenation.com/blog/179064/school-prison-pipeline-starts-preschool#>.

by generations Y and Z as an ‘Internet to prison pipeline.’ Youth that are familiar with the Internet do not often fear repercussions from their actions because the Internet is seen as a safe space for self-exploration. For example, a young person may illegally view online child pornography over a continued period of time, and upon arrest he/she is sentenced to an average of ten years in prison – ultimately throwing his/her young life away.⁵⁸

Sentencing courts should better understand the present-day prolific nature of uninhibited Internet usage by young people, and the effect that usage can have on their emotional and psychological development. With this understanding, a sentencing judge can more accurately determine an individualized sentence for a young child pornography offender who has fallen victim to this Internet to prison pipeline.

III. United States Sentencing Guidelines

The underlying rationale of the Sentencing Guidelines is “to enhance the ability of the criminal justice system to combat crime through an effective, fair sentencing system.”⁵⁹ Congress sought to achieve this first, through honesty in sentencing; second, through uniformity in sentences of similar crimes committed by similar offenders; and third, through a system of proportionality that takes into consideration differing conduct of various levels of severity.⁶⁰

The sentencing statute at question here, 18 U.S.C. § 3553(b), permits a court to depart from a Guideline sentence only when it finds aggravating or mitigating circumstances “not adequately taken into consideration by the Sentencing Commission in formulating the guidelines

⁵⁸ See *An Introduction to Child Pornography Sentencing*, FAMILIES AGAINST MANDATORY MINIMUMS (Aug. 22, 2013), <http://famm.org/wp-content/uploads/2013/09/FS-Intro-to-Child-Porn-8.22.13-fixed.pdf>.

⁵⁹ U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, introductory cmt. (2014).

⁶⁰ *Id.*

that should result in a sentence different from that described.”⁶¹ The Guideline sentences should be viewed as “‘carving out a ‘heartland,’” formula that provides what typical offense conduct looks like as the Guidelines envisions its sentencing structure.⁶² “When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the ‘heartland’ the court may consider whether a departure is warranted.”⁶³

Nevertheless, throughout the history of creating the Guidelines, Congress and The Sentencing Commission have been in disagreement as far as appropriate sentencing format for child pornography offenses.

A. Congress v. The Commission

In 2009, the Sentencing Commission reported about the history of child pornography sentencing and guideline application, which reported that Congress has been overly active in amending offense guidelines in this area.⁶⁴ In 2008 alone, Congress passed three laws amending child pornography statutes. Furthermore, the Commission has reviewed and revised the Guidelines substantive make up a total of nine times due to changing requirements from Congressional legislation and the Sentencing Reform Act of 1984.⁶⁵ Congress has made clear its intent to “increase[e] the guideline penalties and reduc[e] the incidence of downward departures”

⁶¹ *Id.*

⁶² U.S. Sentencing Comm’n, *Guidelines Manual*, *supra* note 59.

⁶³ *Id.* (The Guideline Manual lists several factors the court cannot take into account as grounds for departure: §5H1.10 (Race, Sex, National Origin, Creed, Religion, and Socio- Economic Status), §5H1.12 (Lack of Guidance as a Youth and Similar Circumstances), the third sentence of §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse), the last sentence of §5K2.12 (Coercion and Duress), and §5K2.19 (Post-Sentencing Rehabilitative Efforts)).

⁶⁴ *See generally*, United States Sentencing Comm’n, *The History of the Child Pornography Guidelines* (Oct. 2009), available at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/sex-offenses/20091030_History_Child_Pornography_Guidelines.pdf.

⁶⁵ *Id.* at 1-2.

by “creating new offenses, enacting new mandatory minimums, increasing statutory maximums, and providing directives to the Commission”⁶⁶

Congress has sidestepped the Commission when it comes to the treatment of child pornography offenses, and has passed legislation despite the Commission’s evidence that the Guidelines are sufficient as is. For example, in 1991, the Commission expressed its concern that child pornography offenses “continue to require substantially tougher penalties than typically were imposed under pre-guidelines practice.”⁶⁷ The Commission noted specifically that “a high rate of downward departures and low likelihood of government appeal from these departures suggested that judges and prosecutors thought that the offense level for the least serious forms of conduct under §2G2.2 was too severe.”⁶⁸

Nevertheless, Congress voted 99-0 in the Senate and 414-0 in the House to instruct the Commission to increase base offense levels.⁶⁹ The same congressional treatment was given to amendments in 1995 and 2000 seeking to increase base offense levels and adding sentencing enhancements including the increase in penalty for use of a computer.⁷⁰

The substantial clash between Congress and the Commission came in 2003 with the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act (PROTECT Act), which “made several changes with respect to the child pornography guidelines and contained provisions by which Congress, for the first and only time to date, directly amended the guidelines.”⁷¹ The changes were not minor: first, they were made “apparently without seeking any input from the Commission;” and second, they more than doubled the

⁶⁶ *Id.* at 6.

⁶⁷ *Id.* at 21.

⁶⁸ *Id.*

⁶⁹ See U.S. SENTENCING COMM’N, *supra* note 64, at 20-23.

⁷⁰ *Id.* at 26, 32-33.

⁷¹ *Id.* at 38.

average sentences for receipt and distribution of child pornography through an increased statutory mandatory minimum and maximum sentence.⁷²

Despite the tumultuous development of the current sentencing Guidelines, the silver lining is that the sentencing court through *Booker* is no longer to treat them as mandatory. The sections to follow include an introduction to the Guidelines, their enhancements, and the response of sentencing courts across the country.

B. Federal sentencing of child pornography defendants: § 2G2.2

The Sentencing Guidelines assist federal courts across the country in sentencing defendants uniformly and through a defined process. The sentencing analysis here is intended to cover all types of offenses under USSG § 2G2.1 and 2G2.2, which are trafficking and production offenses.⁷³ Section 2G2.2 includes the trafficking offenses including receipt, possession, transportation, and solicitation or advertising of such materials.⁷⁴ Section 2G2.1 involves production of explicit visual or printed material.⁷⁵

Based on the offense committed, the offender is assigned a base offense level between eighteen and twenty-two.⁷⁶ The base offense level is then increased as the Government and pre-trial services see appropriate based on the specific characteristics of the offense committed in each specific case.⁷⁷

⁷² *United States v. Grober*, 624 F.3d 592, 605-06 (3d Cir. 2010).

⁷³ USSG §§ 2G2.1, 2G2.2 (2009).

⁷⁴ USSG § 2G2.2.

⁷⁵ § 2G2.1. Note: 2G2.1 is typically considered a different and much more violent form of exploitation, but both 2G2.1 and 2G2.2 are equally applicable to the arguments being made in this article regarding the role of the Internet in child pornography offenses committed by generations Y and Z, and the need for individualized sentences. *See id.*; *see also* § 2G2.2.

⁷⁶ USSG § 2G2.1, 2G2.2.

⁷⁷ *Id.*

Common base offense level increases include: increase by two levels if the material involved a prepubescent minor or a minor who had not attained the age of twelve years; increase by two levels for any distribution of the material or by not less than five levels if for pecuniary gain; increase by four levels if the material portrays “sadistic or masochistic conduct or other depictions of violence;”⁷⁸ and if the offense involved a computer increase by two levels.⁷⁹ Additionally, USSG § 2G2.2(b)(7) requires an increase by two levels for “at least 10 images, but fewer than 150,” by three levels for “at least 150 images, but fewer than 300,” by four levels for “at least 300 images, but fewer than 600,” and by five levels for “600 or more images.”⁸⁰ In calculating the number of images, one video is considered to be seventy-five images.⁸¹

Many of the above specific offense characteristic enhancements apply in almost every case, and any mitigating § 3553(a) factors, if any, are practically nullified by the number of enhancements being applied. Specifically, § 2G2.2(b)(6) – the use of a computer – is unfair as it is likely to be applied to every case, and § 2G2.2(b)(7) – the number of images – is problematic due to the ease of access to such materials by using Peer-to-Peer (P2P) networks. These enhancements apply to almost every case, and raise a defendant’s base offense level by several points, and thus their guideline sentence by several years.

As the Government contends that conduct enhancements be applied to a defendant’s base offense level, the defense conversely argues that the enhancements do not apply and there are mitigating factors that warrant a downward departure from the Guideline sentence. These mitigating factors are found in Title 18 U.S.C. § 3553(a) and include, but are not limited to “the

⁷⁸ U.S. SENTENCING COMM’N, FEDERAL CHILD PORNOGRAPHY CASES 34 (2012), http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/sex-offense-topics/201212-federal-child-pornography-offenses/Chapter_02.pdf.

⁷⁹ USSG § 2G2.2.

⁸⁰ *Id.*

⁸¹ *Id.*

nature and circumstances of the offense and the history and characteristics of the defendant;” “the need for the sentence imposed,” such as to afford deterrence, to protect the public, and to provide the defendant with educational or correctional treatment; and “the kinds of sentences available.”⁸² With these directives, the sentencing court “shall impose a sentence sufficient, but not greater than necessary” to comply with the directives listed.⁸³ It is unlikely, however, that mitigating factors convince the sentencing judge that a specific defendant’s conduct is outside the ‘heartland’ of what the Commission had in mind when creating the guideline sentence ranges.

IV. The climate of federal sentencing courts – a trend toward leniency

Recently, there has been a movement where district court judges employ their sentencing discretion in a way that demonstrates disagreement with how Congress has steadily increased the punishments for child pornography without deference to the Sentencing Commission.

A. Statistics about child pornography sentences and arrest

The average sentence for child pornography defendants in 1997 was 20.59 months, or one and one half years imprisonment.⁸⁴ By 2010, after Congress passed its sentencing enhancements, the average sentence increased dramatically to 118 months, or nearly ten years imprisonment; that is a 500 percent increase in sentence length.⁸⁵ Additionally, “[t]he number of federal convictions has increased dramatically as well, rising from a few dozen each year in the

⁸² 18 U.S.C. § 3553(a) (2012).

⁸³ *Id.*

⁸⁴ *An Introduction to Child Pornography Sentencing*, *supra* note 58.

⁸⁵ *Improving the Guidelines for Child Pornography Offenses*, FAMM, <http://famm.org/projects/federal/u-s-sentencing-commission/improving-the-guidelines-for-child-pornography-offenses/> (last accessed Oct. 30, 2015).

1990s to 1,886 cases in fiscal year 2010,” the majority of offenders had no prior criminal record.⁸⁶

These trends have not gone unnoticed by the bench, and district courts across the country have voiced their disapproval through below-guideline sentences and opinions calling for change.

B. A slow trend toward a cure for overly harsh sentences

Courts have voiced their disapproval of the large number of enhancements applied to child pornography offenses, and several circuits including the Second, Third, and Ninth Circuits have shown willingness to explore the underlying justification for child pornography sentences in light of § 3553(a)’s framework and the return of sentencing discretion allowed by *US v. Booker*.⁸⁷ Indeed, in 2010, the Commission conducted a survey that revealed that nearly 70% of federal judges consider sentences for receipt and possession of child pornography to be too severe.⁸⁸

The practice of finding a sentence grounded in reasonableness, proportionality, and individuality participates in an important trend in the sentencing of child pornography defendants and similarly, in substantive appellate review.

i. Second Circuit Court of Appeals

In *United States v. Tutty*, the defendant pled to receipt of child pornography and was sentenced to fourteen years imprisonment.⁸⁹ Defendant appealed his sentence and the Second

⁸⁶ *An Introduction to Child Pornography Sentencing*, *supra* note 58.

⁸⁷ *See generally* 543 U.S. 220 (2005).

⁸⁸ U.S. SENTENCING COMM’N, RESULT OF SURVEY OF UNITED STATES DISTRICT JUDGES JANUARY 2010 THROUGH MARCH 2010 5 (2010), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/surveys/20100608_Judge_Survey.pdf.

⁸⁹ *United States v. Tutty*, 612 F.3d 128, 129 (2d Cir. 2013).

Circuit Court of Appeals held that the District Court's apparent misunderstanding of its authority to depart from United States Sentencing Guidelines when imposing sentence for receipt of child pornography was plain error.⁹⁰

In *United States v. Dorvee*, the defendant was convicted of distribution of child pornography and sentenced to 240 months imprisonment in the United States District Court for the Northern District of New York, and he appealed his sentence.⁹¹ The Second Circuit held the sentence was substantively unreasonable.⁹² The Circuit Court found the sentencing court did not adequately consider the medical testimony evidencing that the defendant was not likely to physically engage with a child, and is not likely to reoffend.⁹³

The *Dorvee* Court encourages District Judges “to take seriously the broad discretion they possess in fashioning sentences under § 2G2.2 – ones that can range from non-custodial sentences to the statutory maximum – bearing in mind that they are dealing with an eccentric Guideline of highly unusual provenance which, unless carefully applied, can easily generate unreasonable results.”⁹⁴

Two cases from the Second Circuit specifically demonstrate both the difficulties and possibilities associated with individualizing a child pornography defendant’s sentence. The first case involves a defendant in *United States v. C.R.* who faced a guideline sentence of fifteen to seventeen years imprisonment, but defendant C.R. was sentenced in the Eastern District of New York to only thirty months, or two and one half years imprisonment.⁹⁵ The sentencing judge

⁹⁰ *Tutty*, 612 F.3d at 131.

⁹¹ See *United States v. Dorvee*, 616 F.3d 174, 176 (2d Cir. 2010).

⁹² *Id.* at 183.

⁹³ *Id.*

⁹⁴ U.S. SENTENCING COMM’N, THE HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES (2009), available at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/sex-offenses/20091030_History_Child_Pornography_Guidelines.pdf.

⁹⁵ *United States v. C.R.*, 792 F.Supp.2d 343 (E.D.N.Y. 2011).

supported his lenient sentence based on a policy disagreement with the Sentencing Guidelines, and his belief that child pornography defendants should be sentenced individually considering their personal characteristics and the circumstances surrounding the offense conduct.⁹⁶ The sentencing judge voiced his concern that the current child pornography sentencing structure “destroy[s] young lives unnecessarily.”⁹⁷

In determining C.R.’s individualized sentence, the factors that lead to leniency include: his status as a minor at the time of arrest, his early exposure to adult pornography by friends at age thirteen and child pornography at fifteen, a lack of parental guidance with an alcoholic and absent mother, the fact that he only passively distributed his images and videos by using an online file-share software that automatically shared its contents, and although C.R. had sexual contact with his much younger sister, two of the three encounters were when he was a minor himself.⁹⁸

Upon appeal by the Government, the Second Circuit Court of Appeals remanded C.R.’s case for re-sentencing, finding that the specific offense characteristics were not inapplicable to C.R., and the five-year statutory maximum was not “grossly disproportionate.”⁹⁹

Two years after C.R. was initially sentenced and before the Court of Appeals remanded that case for re-sentencing, the same judge who sentenced C.R., sentenced a similarly situated defendant, D.M., facing a Guideline sentence between six and eight years imprisonment to only five years probation and mental health counseling.¹⁰⁰ The judge supported his non-Guideline sentence because D.M. was a minor at the time of arrest, D.M.’s exposure and obsession with

⁹⁶ See generally *C.R.*, 792 F. Supp. 2d 343.

⁹⁷ Adam Klasfeld, *Judge Blasted for Light Child Pornography Sentencing*, COURTHOUSE NEWS SERVICE (Sept. 27, 2013, 1:42 AM), <http://www.courthousenews.com/2013/09/27/61571.htm>.

⁹⁸ See generally *C.R.*, 792 F. Supp. 2d 343.

⁹⁹ See *United States v. Reingold*, 731 F.3d 204 (2d Cir. 2013).

¹⁰⁰ See *United States v. D.M.*, 942 F. Supp. 2d 327 (E.D.N.Y. 2013).

child pornography began at a young age, and expert testimony supported the fact that D.M. is not a danger to society and with counseling he is not likely to reoffend.

This time, the Government did not appeal this lenient sentence and the Judge applauded “the sensible cooperation of prosecutor, defense, experts, and the court to save rather than destroy an adolescent found to have used his computer to view child pornography.”¹⁰¹

Both the *C.R.* and *D.M.* cases illustrate the possibility of individualizing sentences for child pornography defendants; specifically, defendants whose offense conduct began in their youth. In sentencing these young offenders, § 3553(a) factors allow for a well reasoned and factually supported sentence that is sufficient, but not greater than necessary to achieve the statutory purposes of punishment. The sentencing judge has the discretion to disregard any inflated guideline sentence, and to focus on the young offender’s individual characteristics, the circumstances surrounding the offense, and his ability to rehabilitate.

Defendant J.C. in the introduction story shares many of the factors listed in the *D.M.* and *C.R.* cases that should have lead to a similarly lenient sentence: JC suffers from serious medical conditions, his conduct began at the very young age of thirteen, he was himself a sexual abuse victim, psychologists assured the court he was not a threat to society and is amenable to treatment, etc. But J.C. did not receive any such leniency by his sentencing judge, and his life was thrown away with a seventeen and one half year sentence.

ii. Third Circuit Court of Appeals

In *United States v. Grober*, the Third Circuit affirmed a District Court child pornography sentencing opinion that questioned the Guideline provisions.¹⁰² In *Grober*, Defendant pled guilty to two counts of transportation of child pornography, three counts of receipt of child

¹⁰¹ *D.M.*, 942 F. Supp. 2d at 329.

¹⁰² See *United States v. Grober*, 624 F.3d 592 (3d Cir. 2010).

pornography, and one count of possession of child pornography, all of which were related to his Internet downloading activities. The sentencing court imposed a below-Guidelines sentence due to the offensive conduct stemming from the act of using internet download software.¹⁰³ The Third Circuit Court of Appeals stated that “[i]t recognized, on the one hand, the tension between a mechanical application of those Guidelines and the ‘outrageously high’ sentence—indeed, the ‘truly remarkable punishment’—of 235–293 months of imprisonment they advised, and, on the other, a fair and reasonable sentence that does justice.”¹⁰⁴ The Circuit Court deduced that the extremely harsh sentence was an effort by the sentencing court motivated by “a candid fear that Congress’s zeal to address the proliferation of child pornography has. Accordingly, the Circuit Court vacated such a disproportionate sentence as improper, and remanded for a new sentencing hearing.

iii. Ninth Circuit Court of Appeals

In *United States v. Henderson*, the Court reversed and remanded a district court decision that departed from child pornography sentencing Guidelines, and departed downward from a Guideline sentence range of eight to ten years and sentenced the defendant to a below-Guideline six years imprisonment followed by a lifetime of supervised release, as the defendant raised an issue of policy disagreement.¹⁰⁵

In *United States v. Apodaca*, the defendant pled guilty and was convicted of possession of child pornography and sentenced to a non-Guideline sentence of two years imprisonment and lifetime supervised release.¹⁰⁶

¹⁰³ *Grober*, 624 F.3d at 596.

¹⁰⁴ *Id.* at 595-98.

¹⁰⁵ See *United States v. Henderson*, 649 F.3d 955, 956-58 (9th Cir. 2011).

¹⁰⁶ See *United States v. Apodaca*, 641 F.3d 1077, 1079 (9th Cir. 2011).

iv. Other Courts

In *United States v. Diaz*, the Eastern District of Wisconsin sentenced a possession-only defendant to six months of imprisonment and twelve years of supervised release.¹⁰⁷ The court supported its non-Guideline sentence based on the fact that the defendant was young (age thirty), had no prior record, was isolated and lonely prior to the offense, he had supportive family and friends to assist in his rehabilitation, and after being indicted he initiated mental health counseling.¹⁰⁸ The doctor charged with his mental health care was able to speak to the defendant's commitment to treatment and desire to learn from his mistakes and not reoffend.¹⁰⁹ After analyzing this specific defendant and the circumstances surrounding his offense, the sentencing court found he has shown ability to rehabilitate, and neither the Guideline imprisonment range nor the Guideline supervised release range (of life) were applicable, and a non-Guideline sentence was sufficient to comport with the purposes of punishment.¹¹⁰

In *United States v. Boyden*, the defendant was facing fifty-one to sixty-three months' imprisonment (four and one quarter to five and one quarter years) and was sentenced to one-day incarceration with credit for time served.¹¹¹ The court supported its decision by taking seriously its job to consider "the nature and circumstances of the offense and the history and characteristics of the defendant" as directed in § 3553(a)(1) of the guidelines, finding the defendant has been a responsible person who has faced many troubling events in his life such as divorce and illness of a child, as well as positive events such as an honorable discharge from the U.S. Army, and being a longtime homeowner.¹¹² Importantly, the court gave great weight to the

¹⁰⁷ *United States v. Diaz*, 720 F.Supp.2d 1039, 1041–42 (E.D.Wis.2010).

¹⁰⁸ *Diaz*, 720 F.Supp.2d at 1041.

¹⁰⁹ *Id.*

¹¹⁰ *See id.* at 1048.

¹¹¹ *United States v. Boyden*, 2007 WL 1725402 (E.D. Mich. 2007).

¹¹² *Id.*

doctors who specialize in sexual addiction who affirmed that the defendant “represents no threat to anyone” and that the offense was out of character for his life and personal standards and “was a temporary blind spot in his otherwise normal and socially conscious moral compass that became an addiction.”¹¹³

The court in *Boyden* is an exemplar for how sentencing judges should ground any decision – above or below Guideline range – with directives from the Guidelines combined with individualized facts from the defendant’s life to create a sentence that will not throw away a person’s life, but assist them in rehabilitation.

In *United States v. Meillier*, the court found a Guideline sentence of fifty-one to seventy-one months (four and one quarter to six years) unjust, and sentenced the defendant charged with three counts of receipt, possession, and distribution of child pornography to one day imprisonment, thirty years supervised release, and 2000 hours community service.¹¹⁴ In imposing a below-guideline sentence, the court emphasized that “those convicted of crimes—even crimes as heinous as possessing child pornography—are human beings, and no two human beings are alike.”¹¹⁵ The court looked at many factors in determining a lenient sentence, and accepted psychological reports detailing curiosity versus compulsion, it analyzed the defendant’s mental capabilities, his low likelihood of reoffending, his risk of victimization, and his own history as a sexual abuse victim.¹¹⁶

¹¹³ *Id.* at 7.

¹¹⁴ *United States v. Meillier*, 650 F. Supp. 2d 887, 887-88 (D. Minn. 2009).

¹¹⁵ *Meillier*, 650 F. Supp. 2d at 900.

¹¹⁶ *See generally Meillier*, 650 F. Supp. 2d 887.

V. Addressing the other side

It seems clear through the history of Congressional action that the scope of child pornography laws and sentence lengths will continue with the trend of expansion. The Congressional commitment to increasing child pornography sentences is grounded in the fear that child pornography viewers will commit predatory physical sexual crimes against children, understood as ‘hands-on’ offenses to differentiate a physical crime from a viewing crime.¹¹⁷ Therefore, the main arguments against non-guideline sentences for child pornography offenses include (1) the fact that the harm caused by the offender is serious and under-appreciated; and (2) that viewing child pornography is a precursor to hands-on child abuse, or evidence of past abuse.

Regarding the first argument, many courts begin opinions with the proposition that child pornography is a very real and violent crime that creates and proliferates unimaginable harm to children. For example, Circuit Judge Hon. Maryanne Trump Barry writes at the outset of her opinion in *Grober* “[i]t is an unassailable proposition that ‘child pornography harms and debases the most defenseless of our citizens.’”¹¹⁸ The issue is not that the crime of child pornography is under-appreciated; rather, the issue is that Congress has consistently bypassed the Sentencing Commission’s recommendations for fair sentences, and Congress refuses to do anything but increase guidelines – despite differing levels of culpability between defendants.

Regarding the second argument, it is speculation to think that the typical offender of today who commits his crime behind the shield of his computer screen will commit a future bad

¹¹⁷ See, e.g., 149 CONG. REC. S231, S243 (daily ed. Jan. 13, 2003) (reporting a “significant link between those offenders who possess child pornography and those who sexually assault children”); 137 CONG. REC. S10, 322 (daily ed. July 18, 1991) (Sen. Helms testifying that “[i]n 1986, the Senate Subcommittee on Investigations found that child pornography was directly connected to child molestations. The experts testified that users of child pornography are frequently pedophiles,” and also speaking to the idea that “[t]here have been dozens of studies by respected experts who come to the same conclusion—child pornography is indeed a cause of child molestations,” though he did not name any study.)

¹¹⁸ *Grober*, 624 F.3d at 595.

act against a minor, and is thus deserving of the same punishment as a defendant who has a history of sexually dangerous behavior, or who was actively seeking interaction with minors during commitment of their offense. The criminal justice system does not punish people for a crime they have not committed, and it does not allow propensity evidence into the courtroom to prove that because someone has committed a bad act, they will do so again – or they will commit worse acts in the future. A congressional increase in sentence length is in effect blindly punishing the *offense*, and does not get to the heart of the issue, which is that the *offender* is what the public is concerned with.

This reluctance to sentence a person to years in prison for falling victim to the Internet has become a key factor in downward sentencing departures in federal courts. Sentencing courts should continue to use personal characteristics and circumstances surrounding the offense to differentiate between people who hide behind their computers receiving child pornography, and offenders who actively seek engagement with minors. Every offender has a differing culpability level, and accordingly there should be differing, individualized sentences.

VI. Conclusion: Moving toward change

The reality is that today's child pornography offender looks very different than twenty-five years ago when this conduct was criminalized. In 1995, the Commission reported that "a significant percentage of [child pornography offenders] are pedophiles, according to some experts," and "[s]uch conduct, committed in addition to offenders' non-production offenses, increases their culpability and suggests heightened sexual dangerousness."¹¹⁹ However, after

¹¹⁹ U.S. SENTENCING COMM'N, FEDERAL CHILD PORNOGRAPHY OFFENSES 314 (2012), http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/sex-offense-topics/201212-federal-child-pornography-offenses/Chapter_12.pdf; *see also* U.S. SENTENCING COMM'N, SEX OFFENSES AGAINST CHILDREN: FINDINGS AND RECOMMENDATIONS REGARDING FEDERAL PENALTIES i (1996),

conducting an examination of over 2,500 presentence investigation reports of non-production cases in 2012, 69.1% of offenders had no record of prior sexually dangerous behavior.¹²⁰

Today's offender will use a computer and through the Internet and its technologies will amass a much larger collection of illegal materials much faster than in the past using post mail.¹²¹ Generations Y and Z, however, will undoubtedly turn to their computers and smart phones to access information on the Internet. And with the aid of modern technologies including Peer-to-Peer file sharing and torrent technologies, e-mail, instant messaging, chat rooms, etc., a large amount of material, legal and illegal, is available online, and there are endless ways to access and store the material; and thus, defendants today and in the future are facing almost every sentencing enhancement on the books. These changes in technology do not automatically make the offender more harmful to the public, and an individualized approach to each case is warranted to determine a proper sentence. The bench should consider the following approach to understanding *who* the defendant is, and *why* he may have fallen victim to the depravity of child pornography.

Personal characteristics including the offender's age, the age the offender began viewing illegal materials, offender's social capacities, offender's health condition both physical and mental, the offender's support system and familial situation, etc. Circumstances surrounding the offense conduct is also important in determining an individualized sentence, including why the

http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/sex-offense-topics/199606-rtc-sex-crimes-against-children/199606_RtC_SCAC.pdf (finding that "a significant portion of child pornography offenders have a criminal history that involves the sexual abuse or exploitation of children and that those with such histories are at greater risk of recidivism").

¹²⁰ U.S. SENTENCING COMM'N, *supra* note 122, at 314-315.

¹²¹ See Mark Motivans & Tracey Kyckelhahn, *Federal Prosecution of Child Sex Exploitation Offenders*, 2006, BUREAU JUST. STAT. BULL. 2 (Dec. 2007), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fpcseo06.pdf>.

offender says he became involved with the illegal material, how he first became exposed to the material, whether he has actively sought physical encounters with any victims, etc.

The lists above are not novel, nor are the exhaustive. However, the offender's situation, which provides mitigating evidence, is often undervalued as compared to the Government's aggravating evidence.

In the case of Jeremy Crown, the defense proffered a great deal of mitigating evidence including: medical records proving the defendant is sickly, psychological examination records proving Crown had an addiction to collecting pornographic material but is not a danger to the public and is a candidate for outpatient treatment, and a polygraph examination proving he has never touched any person under the age of eighteen. Additionally, Crown had led an otherwise exemplary life, and had family and friends who were more than supportive and willing to assist in his treatment and recovery. Further evidence regarding Crown includes the defendant's personal situation as a victim of sexual abuse himself, and the fact that he began looking at pornographic images with a friend at age thirteen, and he continued to seek out child pornography to empathize and relate to the victims. Sadly, throughout his teen years his addiction formed and became a compulsion. Ultimately, as an adult, it led to his arrest.

Despite the great amount of mitigating evidence Crown presented, the sentencing judge gave a cursory nod to his unfortunate situation, but decided that the aggravating factors outweighed any possible defense for the young man's actions. The judge accordingly sentenced the twenty-three year old to seventeen and one half years in prison, effectively throwing his young life away for offense conduct that began as a thirteen-year-old sexual abuse victim, and continued as a sick and lonely teenager.

To obtain a just sentence, courts must continue to be active in employing their Supreme Court-granted discretionary power, and analyze every defendant's personal characteristics and the circumstances surrounding their offense conduct to find the punishment that is sufficient, but not greater than necessary.

In closing, it is meaningful to repeat the words of District Court Judge Patrick J. Schiltz: “those convicted of crimes—even crimes as heinous as possessing child pornography—are human beings, and no two human beings are alike;” and it follows, that no two sentencing decisions should be alike.

Modern Media and its Effect on High-Profile Cases

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Abstract

The purpose of this paper is to explore whether or not increased media coverage of criminal trials can make an impact on the outcome a high-profile case. In order to assess this issue, this paper will view the 1st and 6th Amendments to determine if technological advances in the media affect the rights of the parties involved in a case. Next, this paper addresses how technological advancements in the way people receive their news has created difficulties for the courts in regard to maintaining a fair trial. Furthermore, this paper will view past and present high-profile cases that have been subjected to intense media scrutiny to determine whether or not the media had made an impact on the outcome. Lastly, this paper will discuss the remedies that are in-place to protect a defendant's Sixth Amendment right to a fair and impartial jury when the media reports on the defendant's case.

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Introduction

Did you see the news? This is a phrase that is thrown around daily between Americans. As technology has grown, so has the ability of Americans to access information, particularly the news. In present day, a person has to literally live under a rock to avoid hearing about some current event that is trending throughout the country. It is not uncommon for someone in California to learn of an event that occurred in New York within seconds of that event happening. With the introduction of iPhones, Twitter, Facebook, and other websites and devices, Americans are consistently being informed of current events. As of July 2006, it has been reported that 81% of Americans access the news.² This number is large and it does not even take into consideration how many individuals hear about the news through word of mouth. That being said, this paper seeks to address the question, whether this wide access to news impacts highly publicized court cases and if it does, should the media be regulated on what it reports?

With this in mind, this paper will begin by viewing the media's rights to report on court cases provided under the 1st amendment right to free press. From there, this paper will discuss a defendant's rights under the 6th amendment to a fair and impartial jury.

In light of new technology and the national obsession of social media, this paper will discuss how social media may present a major problem for courtrooms.

Following this analysis, this paper will view past and present cases that have received extensive publicity and whether or not the outcomes of those cases had been affected by the media.

² *Where Do We Get Our News?*, Frontline, July 30, 2006, <http://www.pbs.org/wgbh/pages/frontline/newswar/part3/stats.html>. <http://www.pbs.org/wgbh/pages/frontline/newswar/part3/stats.html>.

Lastly, this paper will view the current remedies that are in place to ensure that a fair trial is provided without affecting the rights of the media and then analyze whether those remedies are effective or not.

I. Analysis of the First and Sixth Amendments

a. Media Rights Under the 1st Amendment

The 1st Amendment states:

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”³

While, on its face, the 1st amendment may seem vague with respect to the rights of the media to report on court cases, throughout the years, the courts have defined this right and have primarily protected the right of the media to conduct almost unfettered reporting when it comes to court cases.⁴

In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), the court, for the first time, determined that the public and the media might attend criminal court cases.⁵ At issue in *Richmond*, was whether or not the trial-in-question could be closed to disallow two news reporters from being present in the courtroom.⁶ The court determined that, historically, trials

³ U.S. Const. amend. I.

⁴ Douglas E. Lee, *Freedom of the Press*, First Amendment Center (Sept. 13, 2002), <http://www.firstamendmentcenter.org/courtroom-access>

⁵ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980).

⁶ *Id.* at 563.

were presumptively open to the public.⁷ The court rationalized this determination based on the view that by holding trials open to the public, proceedings would be conducted fairly to all parties involved.⁸ Furthermore, open trials could potentially discourage perjury, misconduct, and decisions based on bias.⁹ In addition, the court recognized that open trials provide a therapeutic value for the community.¹⁰ This theory was based on the idea that when a shocking crime occurs, the community is usually outraged, and the open trial provides the community with an outlet to express concern and hostility in a civilized manner.¹¹

The ruling in *Richmond* was extended in *Press-Enterprise Co. v. Superior Court* when the court determined that the public and the media may attend preliminary hearings and may have access to transcripts involved in preliminary hearings.¹² At issue in *Press Enterprise* was whether the First Amendment grants public access to a transcript of a preliminary hearing produced during a criminal prosecution.¹³ The court determined that the First Amendment grants public access to preliminary hearings for a number of reasons.¹⁴ First, the court acknowledged that there is a tradition of holding preliminary hearings open to the public.¹⁵ After viewing a series of prior cases, the court noted “openness in criminal trials, including the selection of jurors, enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.”¹⁶ Second, the court explained that public access to

⁷ *Id.* at 569.

⁸ *Id.* at 573.

⁹ James H. Landman, *Balancing Act: First and Sixth Amendment Rights in High-Profile Cases*, ABA (June 2005), http://www.americanbar.org/content/dam/aba/images/public_education/04_mayjun05_balancingact_landman.pdf.

¹⁰ *Id.*

¹¹ *Id.*

¹² Lee, *supra* note 3.

¹³ *Press-Enterprise Co.*, 478 U.S. at 3.

¹⁴ *Id.* at 15.

¹⁵ *Id.* at 10.

¹⁶ *Id.* at 9.

preliminary hearings helps to ensure that the judicial system is functioning appropriately.¹⁷ The court acknowledged that the preliminary hearing is similar to the trial and, many times, the preliminary hearing, itself, is the final and most important part of the criminal proceeding and should be held open to the public.¹⁸ However, the court drew a distinction between preliminary hearings and grand jury proceedings. Grand jury proceedings, the court explained, are supposed to be conducted in private and holding them open would defeat the purpose of the grand jury proceeding.¹⁹ In this case, in contention was not a transcript derived from a grand jury proceeding, but rather, was a transcript produced from a preliminary hearing.²⁰ Thus, the court concluded that denying access to the transcript would frustrate the therapeutic value of openness described in *Richmond*.²¹

While there are certain restrictions on media access to obtain documents or recordings and to attend pretrial hearings, the theory relied upon in *Richmond* and *Press Enterprise* is that the trial is presumptively open to the public.²² While this presumption can be difficult to overcome, many state legislatures and the courts have exercised their power to limit the media's access to such information when the rights of the parties to the case could potentially be harmed.²³

¹⁷ *Press Enterprise*, 478 U.S. at 2.

¹⁸ *Id.* at 10.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² Landman, *supra* note 8 at 185.

²³ *Id.*

b. Defendant's Rights Under the 6th Amendment

The Sixth Amendment states:

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.”²⁴

There are many important aspects presented in the Sixth Amendment. However, for the purposes of this paper, the defendant's right to an impartial jury will be main the focus going forward. An impartial jury can be defined as a jury that does not hold any bias surrounding the case-in-question.²⁵ Anything that could affect the juror's ability to provide a fair verdict based solely on the facts presented at trial, in theory, should disqualify that juror from participating in the trial.²⁶

A common problem affecting the impartiality of jurors occurs when one or may jurors receive information from an extraneous source.²⁷ The courts have said that the “evidence developed against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel.”²⁸ Thus, evidence presented to a juror either through the media, a friend, family member or a stranger outside the courtroom is presumptively prejudicial and can only be overcome if there is persuasive evidence for the court to conclude that the juror may still render

²⁴ U.S. Const. amend. VI.

²⁵ *What is an Impartial Jury?*, Law Dictionary (Last visited January 22, 2015), <http://thelawdictionary.org/impartial-jury/>.

²⁶ *Sixth Amendment –Right to Trial by an Impartial Jury*, law.jrank.org (Last visited January 22, 2015), <http://law.jrank.org/pages/10301/Sixth-Amendment-Right-Trial-by-an-Impartial-Jury.html>.

²⁷ *Id.*

²⁸ *Parker v. Gladden*, 385 U.S. 363, 364 (1966).

an impartial verdict.²⁹ However, as will be discussed later in this paper, proving that a juror was biased due to media coverage is a very difficult task.

Concerns over the media's effect on a defendant's sixth amendment right to a fair and impartial jury began as early as the 1800's in a landmark case called *United States v. Burr*. In 1807, Vice President Aaron Burr was charged with treason. Burr was alleged to have created a plan to take over New Orleans and conquer Mexico.³⁰ Newspapers quickly became fascinated with this notion that a Vice President had planned on taking over a country and establishing an empire in southwestern United States.³¹ As a result of the high publicity this case received, concerns over Burr being unable to receive a fair trial due to the media coverage were quickly realized.³² Chief Justice Marshall, in his opinion, expressed his concern about potential jurors being prejudiced by the media. He stated,

“[A juror] may declare that notwithstanding these prejudices he is determined to listen to the evidence, and be governed by it; but the law will not trust him Such a person may believe that he will be regulated by testimony, but the law suspects him, and certainly not without reason.”³³

In light of these concerns, Marshall had reportedly dismissed forty-eight jurors on the first day of voir dire because those jurors had been influenced by the newspaper's discussion of the trial.³⁴ The fear that a defendant's Sixth Amendment right could be violated by media coverage was also acknowledged in 1941 in *Bridges v. California*, when Justice Hugo Black

²⁹ *Sixth Amendment*, *supra* note 25.

³⁰ John C. Meringolo, *The Media, the Jury, and the High-Profile Defendant: A Defensive Perspective on the Media Circus*, 55 N.Y.L. Sch. L. Rev. 984-985 (2010).

³¹ *Id.*

³² *Id.*

³³ *United States v. Burr*, 25 F. Cas. 49 (C.C.D. Va. 1807).

³⁴ Meringolo, *supra* note 29.

stated “Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper.”³⁵ However, today, Justice Black’s apprehension toward media coverage seems to have fallen on deaf ears since the media is usually permitted to attend many aspects of the trial process.³⁶

The effect the media has on juror impartiality has continued to grow today and has become even more problematic in the wake of the social media craze.

II. Social Media and its Effect on High-Profile Cases

Since the introduction of social media sites such as Facebook, Twitter, Google Plus, YouTube, personal blogs and others, Americans, nationwide, have been fixated with posting about current events and trending topics discussed by the media. So, when a high-profile court cases hits the news, social media sites erupt with discussions and theories about the trial. While this may seem harmless, it is important to note that potential jurors are part of the group of people who use these websites. This can cause a major problem for defendants who have the right to a fair trial.

a. Who is Using Social Media?

Many people may not stop and think how many people in today’s age are using social media sites. With the increase in technology and the desire for Americans to remain “in touch” with friends, family, current events and the like, social media has swept the nation. As of January 2014, it was reported that 74 percent of online adults use social media sites.³⁷ While the

³⁵ *Bridges v. California*, 314 U.S. 252 (1941).

³⁶ Lee, *supra* note 3.

³⁷ *Social Networking Fact Sheet*, Pew Research Center (January, 2014), <http://www.pewinternet.org/fact-sheets/social-networking-fact-sheet/>.

majority, 71 percent uses Facebook, 23 percent of the population is active on Twitter.³⁸ What is even more notable is that as of January 2014, 90 percent of Americans were reported to have cell phones and of those with cell phones, 58 percent of Americans were reported to have smart phones.³⁹ Of those individuals with smart phones, 34 percent are actively accessing the Internet using their phones.⁴⁰ Given these statistics, it is clear, social media has quickly captivated the attention of most Americans. So, what does this have to do with high-profile cases?

A Facebook news survey taken in August 2013 indicated that 78 percent of Facebook users get news when they are on Facebook.⁴¹ It was also reported that 52 percent of Twitter users were reported to access the news through the site.⁴² Thus, when a high-profile case is featured on the news, there is a chance that possibly 78 percent of Facebook users and 52 percent of Twitter users are at least aware of the trial. This is staggering number considering that of those people mentioned, many could be potential jurors in a high profile case.

Even more notable is the number of lawyers and judges who use social media. A recent study has shown that 80 percent of law firms have blogs and many of those firms also use Facebook and Twitter.⁴³ The study also showed that 81 percent of attorneys are active on social media.⁴⁴ In 2010, the Conference of Court Public Information Officers conducted a survey entitled “New Media and the Courts: The Current Status and a Look at the Future.”⁴⁵ The study

³⁸ *Id.*

³⁹ *Mobile Technology Fact Sheet*, Pew Research Center (January 2014), <http://www.pewinternet.org/fact-sheets/mobile-technology-fact-sheet/>.

⁴⁰ *Id.*

⁴¹ Amy Mitchell, et al., *The Role of News on Facebook*, Pew Research Center (Oct. 24, 2013), <http://www.journalism.org/2013/10/24/the-role-of-news-on-facebook/>.

⁴² *Id.*

⁴³ Amy J. St. Eve, et al., *More from the #Jury Box: The Latest On Juries and Social Media*, Duke L.J. 69 (2014), <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1247&context=dltr>.

⁴⁴ *Id.*

⁴⁵ John G. Browning, *Why Can't We Be Friends? Judges' Use of Social Media*, U. Miami. L. Rev. 488 (2014), <http://lawreview.law.miami.edu/wp-content/uploads/2011/12/Why-Cant-We-Be-Friends-Judges-Use-of-Social-Media.pdf>.

indicated that 40 percent of the judges who responded to the survey said that they used social media sites.⁴⁶ This widespread use of social media in the legal field shows the importance of social media in today's age. However, the widespread use across the legal field could create ethical issues and more hardships for defendants seeking a fair trial.

b. Does Social Media Really Affect Trials?

Social media is here to stay, and for good reason, it keeps Americans informed and in touch with family and friends. However, concerns about social media infiltrating the legal system and affecting the outcome of trials, is a very real concern.

Reuters Legal conducted research using Westlaw research services to determine whether or not social media and the Internet affect trials.⁴⁷ The study compiled the number of new trials, denied requests for new trials, and overturned verdicts due to juror Internet use.⁴⁸ The research found that "since 1999, at least 90 verdicts have been the subject of challenges because of alleged Internet-related juror misconduct. More than half of the cases occurred in the last two years. Judges granted new trials or overturned verdicts in 28 criminal and civil cases -- 21 since January 2009. In three-quarters of the cases in which judges declined to declare mistrials, they nevertheless found Internet-related misconduct on the part of jurors."⁴⁹ These statistics are fairly high considering the research does not account for Internet use by jurors that has gone undetected.⁵⁰ Reuters Legal also monitored Twitter by typing "jury duty" in the search bar.⁵¹

⁴⁶ *Id.*

⁴⁷ Brian Grow, *As jurors go online, U.S. Trials go off track*, Reuters (Dec. 8, 2010), <http://www.reuters.com/article/2010/12/08/internet-jurors-idUSN0816547120101208>

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

Reuters found that while many Tweets were in regard the boredom caused by jury duty, a large number of Tweets were statements about the defendant's guilt.⁵²

As the research indicates, something as simple as a juror's Tweet can affect the entire trial. This was especially true in a landmark case, which took place in Arkansas called, *Dimas-Martinez v. State*. The issue in the case was in regard to a juror who had tweeted throughout the trial.⁵³ The jury ultimately found the defendant guilty of murder he was sentenced to death.⁵⁴ One of the Tweets sent by the juror stated "it's (sic) over," 50 minutes before the jurors had finished deliberations.⁵⁵ As a result of this Tweet, one of the juror's Twitter followers, who was a journalist, had reported that the jury had reached a verdict before it was announced to the court.⁵⁶ The defendant's attorney brought the juror's Tweets to the attention of the judge and requested a new trial, but the judge ultimately denied the request.⁵⁷ However, on appeal, the judge reversed the death sentencing stating,

"This court has recognized the importance that jurors not be allowed to post musings, thoughts, or any other information about trials on any online forums. The possibility for prejudice is simply too high. Such a fact is underscored in this case . . . because one of the juror's Twitter followers was a reporter. Thus, the media had advance notice that the jury had completed its sentencing deliberations before an official announcement was made to the court. This is simply unacceptable, and the circuit court's failure to acknowledge this juror's inability to follow the court's directions was an abuse of discretion."⁵⁸

⁵² Grow, *supra* note 46.

⁵³ Eric P. Robinson, *Arkansas Case Shows Dilemma of Jurors Using Social Media*, Gateway (April 16, 2012), <http://gatewayjr.org/2012/04/16/arkansas-case-shows-dilemma-of-juries-and-social-media/>.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Dimas-Martinez v. State*, 385 S.W.3d 238 (Ark. 2011).

⁵⁸ *Id.* at 248.

The appellate judge in *Dimas-Martinez v. State* continued his discussion on the use of social media and the problems it causes for trials. He stated,

“Finally, we take this opportunity to recognize the wide array of possible juror misconduct that might result when jurors have unrestricted access to their mobile phones during a trial. Most mobile phones now allow instant access to a myriad of information. Not only can jurors access Facebook, Twitter, or other social media sites, but they can also access news sites that might have information about a case. There is also the possibility that a juror could conduct research about many aspects of a case. Thus, we refer to the Supreme Court Committee on Criminal Practice and the Supreme Court Committee on Civil Practice for consideration of the question of whether jurors' access to mobile phones should be limited during a trial.”⁵⁹

Dimas-Martinez v. State provides great insight into the legal and ethical issues social media presents in trials. Even when news stations are not primarily involved in reporting on a high profile trial, the accessibility to social media sites can still infringe on a defendant's sixth amendment rights.

III. Media Influence on High Profile Cases

So far, it has become apparent that the court cannot constitutionally prohibit the media from reporting on court cases both before a trial and especially during a trial. Under the first amendment, the media has been able to report almost every aspect of a trial. This section will view past and present cases that have received high publicity due to the media and discuss whether or not the media has impacted the outcome of these cases.

⁵⁹ *Id.* at 249.

a. The Lindbergh Baby Kidnapping

One of the most highly publicized cases in American history occurred when Charles Lindbergh's child was kidnapped. Charles Lindbergh was an American hero who rose to fame when he flew a single-engine airplane from New York City to Paris, France.⁶⁰ Lindbergh was a pioneer of the aviation industry and was famous throughout the country.⁶¹ In 1932, Lindbergh's infant son was kidnapped and a ransom note was left requesting Lindbergh pay \$50,000 if he ever wanted to see his son again.⁶² After about a month, kidnapper wrote to the Lindbergh's and told them when and where to deliver the ransom money.⁶³ The money was dropped off accordingly, but the Lindbergh baby was not returned.⁶⁴ A few weeks later, the body of the child was found in the woods not far from Lindbergh's home.⁶⁵ Two years later, police were able to find the kidnapper to be a man named Bruno Richard Hauptmann.⁶⁶

Throughout this time, the media covered every aspect of this story starting with the disappearance of the child, to the discovery of the child's remains, and eventually to the capture of Hauptmann.⁶⁷ Once the trial began, news reporters from throughout the country stormed to Flemington, New Jersey, where the trial was being held in a small courtroom.⁶⁸ The newspapers labeled the trial, "The Trial of the Century."⁶⁹ At the time, the technological advances in radio and film industry had just begun to take off and news reporters had taken full advantage.⁷⁰

⁶⁰ *Free Press v. Fair Trial: The Lindbergh Baby Kidnapping Case*, CRF USA (July 2000), <http://www.crf-usa.org/bill-of-rights-in-action/bria-10-1-a-free-press-vs-fair-trial-the-lindbergh-baby-kidnapping-case>.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Free Press*, *supra* note 59.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Free Press*, *supra* note 59.

Reporters were consistently sneaking in cameras and newsreels into the courtroom, even though the judge at the time had prohibited them.⁷¹

With the widespread interest in the trial coupled with the new advancements in technology, judges feared greatly that jurors would be biased.⁷² As a result, the chosen jurors were sequestered to a hotel.⁷³ In spite of the sequestration order, jurors were still subject to a hostile crowd of thousands who had swarmed outside the courthouse and were calling for Hauptmann's execution.⁷⁴ When deliberations began, the hostility of the crowd continued to increase and someone had reportedly thrown a rock through the courtroom window.⁷⁵ When the jury returned, they found Hauptmann guilty and recommended the death penalty.⁷⁶

In light of the media obsession and national outrage surrounding this trial, it is likely that the twelve jurors who served in this trial were probably influenced in some way by the media.⁷⁷ With radio broadcasts reporting on the trial daily and news reporters infesting the courtroom, the jurors were probably well aware of what was at stake. While there is no way to tell for sure how much of a role the media may have influenced outcome, this trial shows how with new technology (at the time) and the media's obsession with high profile cases, a defendant's sixth amendment right to a fair and impartial jury can be placed in grave danger.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Free Press, *supra* note 59.

⁷⁶ *Id.*

⁷⁷ *Id.*

b. The O.J. Simpson Trial

Who could forget the O.J. Simpson trial? The People vs. O.J. Simpson, was one of the most highly publicized trials in American History.⁷⁸ O.J. Simpson was an African American running back in the NFL.⁷⁹ After O.J. had retired from football, he remained in the public eye as an actor and sports commentator.⁸⁰ In June 1994, O.J. Simpson was charged with the murders of Nicole Brown and Ronald Goldman in Los Angeles, California.⁸¹ The time and location for this crime played a factor in the increased media attention this trial received.⁸² Only three years prior was the infamous Rodney King beatings, which spurred racial outrage throughout the country.⁸³ So, when O.J. Simpson was on trial for murder, the media swarmed to cover the story.

The media attention this trial received was like none other the country had ever experienced. Photos and videos of the crime scene were shown on every news station. People, nationwide, watched the trial daily.⁸⁴ The media obsession with the trial also focused on the racial outrage going on in the country.⁸⁵ Many African Americans believed O.J. Simpson was innocent and was only targeted because of his race.⁸⁶ This caused many people to believe that if O.J. Simpson were found guilty, a race riot would occur.⁸⁷

What is notable is that much of the media coverage of O.J. Simpson's alleged murders occurred prior to the start of the trial.⁸⁸ The coverage included the infamous police chase of O.J.

⁷⁸ Arthur Gross-Schaefer, Are Media Influences and Technological Complexities Crippling the Ability of Jurors to Deliver Fair Verdicts?, 20 J.L. Bus. & Eth. 1, Winter 2014 at 11, 12.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ Gross-Schaefer, *supra* note 77.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Gross-Schaefer, *supra* note 77.

⁸⁷ *Id.*

⁸⁸ *Id.*

in his white Ford Bronco, photographs of the crime scene, and O.J.'s arrest.⁸⁹ This made it difficult for the court to find jurors that were not affected by the media coverage.⁹⁰ While there is no way to confirm that the jurors who were picked were affected by the extensive media coverage, it is very likely that many, if not all had, in some way, been affected.⁹¹ As we all know, O.J. was acquitted of the murder charges. What we may never know is whether he was acquitted because of the media coverage. This makes the O.J. case a prime example of how the media can potentially make an impact on a high-profile case.

c. The Scott Peterson Trial

In 2003, a man named Scott Peterson was charged with the murder of his wife Laci and unborn son.⁹² Peterson's wife went missing in 2002.⁹³ Initially, Peterson was not suspected in the disappearance of his wife.⁹⁴ He claimed he was fishing and when he returned home, his wife was gone.⁹⁵ However, it was later discovered that Peterson had extramarital affairs, which called into question his character.⁹⁶ In 2003, the body of Peterson's wife washed up on shore nearby the place Peterson claimed he was fishing.⁹⁷ Police immediately tracked down Peterson for fear he would leave the country.⁹⁸ When they found Peterson, he had dyed his hair blonde and had been hiding in San Diego.⁹⁹

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Gross-Schaefer, *supra* note 77.

⁹² Sam Popp, *The Media Bias Against Scott Peterson*, Academia.org (Nov. 16, 2011), http://www.academia.edu/5043168/Media_Bias_against_Scott_Peterson

⁹³ *Id.*

⁹⁴ Popp, *supra* note 91.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Popp, *supra* note 91.

The media obsession with this case began before the body of Peterson's wife's body was found.¹⁰⁰ Once it was revealed that Peterson had been cheating on his wife, he quickly turned him from being a victim, to a villain.¹⁰¹ All of the major news stations reported on Peterson's affair and severely damaged his reputation.¹⁰² Before the body was discovered, the court of public opinion had already deemed Peterson guilty of his wife's disappearance.¹⁰³

When the body was discovered and Peterson was arrested, the media continued to crucify him on a daily basis.¹⁰⁴ Once the trial began, the media craze of the trial became so intense that a gag order was issued to prevent anyone associated with the trial from sharing information with the media.¹⁰⁵ Peterson's attorney had even requested a change in venue because he feared the jury pool in the area was tainted due to the media coverage of the trial.¹⁰⁶ The judge granted the request of a change in venue.¹⁰⁷ In 2005, Peterson was sentenced to death.¹⁰⁸ However, in 2012, Peterson's attorney has appealed his conviction claiming that the jury was affected by hostile publicity.¹⁰⁹

The Scott Peterson pretrial and the trial itself shows the power the media has on the public and subsequently the jury. The media influence in this trial is proven by the fact that a gag order and change of venue were issued due to legitimate concerns that the jury pool had been tainted by the media coverage. While the evidence against Peterson probably would have

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ Popp, *supra* note 91.

¹⁰⁵ CNN Library, *Scott Peterson Trial Fast Facts*, CNN (April 22, 2014), <http://www.cnn.com/2013/10/15/us/scott-peterson-trial-fast-facts/>.

¹⁰⁶ Chuck Afferback, *Judge Changes Peterson Trial Site*, CNN (Jan. 8, 2004), <http://www.cnn.com/2004/LAW/01/08/peterson.case/>.

¹⁰⁷ *Id.*

¹⁰⁸ CNN Library, *supra* note 104.

¹⁰⁹ *Id.*

resulted in a conviction anyway, this case provides great insight into the damage that media coverage of high profile cases can have on a defendant.

d. The Casey Anthony Trial

In 2008, the trial of Casey Anthony received nationwide coverage, much like the O.J. Simpson trial.¹¹⁰ Casey Anthony was charged with murder of her two-year-old daughter, Caylee. The facts of the case were particularly troubling.¹¹¹ Anthony, who was 22 years old at the time her daughter went missing, was reported to have partied and acted like nothing was wrong.¹¹² On June 9, 2008, Anthony contacted the police about the disappearance of her daughter.¹¹³ Days later, Anthony's mother contacted the police telling them to arrest Anthony because she found Anthony's car and it smelled like a dead body had been in the trunk.¹¹⁴ When police questioned Anthony, she admitted she had not seen her daughter in 30 days.¹¹⁵ While Anthony was not a high-profile celebrity, the gruesome facts of this case garnered mass media attention and captivated Americans nationwide.¹¹⁶ Not only were news stations covering the trial, social media sites like Facebook and Twitter erupted with outrage over the incident.¹¹⁷

The media coverage was so extensive it caused the judge presiding over the trial to seek out jurors from another county for fear that jurors from the area would be tainted due to the coverage.¹¹⁸ Pictures of Anthony partying, during the period of time when her daughter was

¹¹⁰ See Gross-Schaefer, *supra* note 77, at 7.

¹¹¹ *Id.*

¹¹² CNN Library, *Casey Anthony Trial Fast Facts*, CNN (July 1, 2014), <http://www.cnn.com/2013/11/04/us/casey-anthony-trial-fast-facts/>

¹¹³ *Casey Anthony Trial Fast Facts*, *supra* note 111.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ See Gross-Schaefer, *supra* note 77.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

missing, were shown on every major news station and were posted all over Facebook and Twitter.¹¹⁹ Americans were posting comments about the trial daily and the media was relentlessly covering the story 24/7.¹²⁰

While the jurors deemed Anthony not guilty, the court of public opinion pronounced her guilty.¹²¹ In fact, USA today took a survey that indicated about 64% of Americans believed Anthony definitely or probably murdered her daughter.¹²² Many Americans also believed the jurors were incompetent for determining Anthony was not guilty.¹²³ Though the media coverage, which was very anti-Anthony, did not impact the verdict, Anthony will forever be deemed a murderer in the eyes of the public.¹²⁴ The issue that is presented in the aftermath of this case could mean that if a future defendant finds him or herself charged for the same heinous crime, the jurors in that case may not forget the outrage over the Casey Anthony decision and could potentially be biased when determining whether or not that individual is guilty.¹²⁵

The trial of Casey Anthony shows another prime example of how the media can impact the justice system. Even if a person is determined to be not guilty, that person may still never be able to come back from the damage to his or her reputation due to the media coverage over the trial.

¹¹⁹ *Id.* at 7-8.

¹²⁰ *See Id.*

¹²¹ Gross-Schaefer, *supra* note 77, at 8.

¹²² Marisol Bello, *Casey Anthony Verdict Doesn't Sit Well with Many Americans*, USA Today (July 8, 2011), http://usatoday30.usatoday.com/news/nation/2011-07-07-casey-anthony-trial_n.htm.

¹²³ Gross-Schaefer, *supra* note 77, at 8.

¹²⁴ *See Id.*

¹²⁵ *See Id.*

e. The George Zimmerman Trial

The George Zimmerman trial is another example of how extensive media coverage of a high profile case can affect the outcome of the trial and the life of the person who has been accused. In February 2012 George Zimmerman was accused of fatally shooting a young man named Trayvon Martin.¹²⁶ This case was on the same level as the O.J. Simpson trial regarding racial outrage. The facts of the case were that Zimmerman was patrolling the neighborhood as part of a neighborhood watch.¹²⁷ He noticed Martin suspiciously walking around the neighborhood and had called the police.¹²⁸ Subsequently, an altercation took place and Zimmerman shot Martin. Zimmerman was not originally charged for the death of Martin.¹²⁹ This caused the story to explode and outrage was expressed throughout the country.¹³⁰ President Obama even got involved and stated that the incident required national “soul searching.”¹³¹ Zimmerman was later charged with second-degree murder.¹³²

This case received media attention nationwide. Social media erupted with people arguing about whether Zimmerman was guilty or innocent of the crime.¹³³ Racial tensions were extremely high during this trial. The Black Panther Party had even reportedly offered \$10,000 for the capture of George Zimmerman.¹³⁴ Given the media attention and widespread outrage over this trial, finding un-biased jurors was a difficult task.

¹²⁶ Jeffrey Toobin, *The Facts of the George Zimmerman Trial*, NEW YORKER (July 16, 2013), <http://www.newyorker.com/news/daily-comment/the-facts-in-the-zimmerman-trial>.

¹²⁷ Toobin, *supra* note 125.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ CNN Library, *Trayvon Martin Shooting Fast Facts*, CNN (Feb. 11, 2015, 2:38 PM), <http://www.cnn.com/2013/06/05/us/trayvon-martin-shooting-fast-facts/>.

¹³² *Id.*

¹³³ Mike Schneider, *George Zimmerman Trial: Social Media Infiltrates Trial*, HUFFPOST (July 7, 2013), http://www.huffingtonpost.com/2013/07/07/george-zimmerman-trial-social-media-infiltrates-trial_n_3557734.html.

¹³⁴ CNN Library, *supra* note 130.

Extensive research by social scientists regarding pre-trial publicity and its effects on jurors has been conducted in light of trials like that of Casey Anthony and George Zimmerman.¹³⁵ The studies indicated, "Media coverage containing case-specific information, inadmissible information, and emotional accounts of trials has the potential to influence jurors' perceptions of defendant culpability, which may lead to a significantly greater chance that a defendant is ultimately found guilty."¹³⁶ Conversely, positive pre-trial publicity has an opposite effect.¹³⁷ Potential jurors who are exposed to positive publicity about a defendant are more likely to find him or her not guilty.¹³⁸ Interestingly though, a study conducted by Christine Ruva, Christina Guenther and Angela Yarbrough at the University of South Florida found that mixed coverage, both positive and negative, favored the defendant.¹³⁹

In George Zimmerman's case, the media outlets were split.¹⁴⁰ Some news stations were anti-Zimmerman, while others were pro-Zimmerman.¹⁴¹ This could indicate that potential jurors had favored Zimmerman based on the study conducted by Ruva, Guenther, and Yarbrough.¹⁴² While there is no way to tell for sure whether jurors had favored Zimmerman due to the media coverage, it is extremely likely many of the jurors had an idea of who Zimmerman was and what he was charged with prior the trial.

¹³⁵ Dylan Matthews, *How the Media Might Have Helped George Zimmerman Go Free*, WASH. POST (July 15, 2013), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/07/15/how-the-media-might-have-helped-george-zimmerman-go-free/>.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ Matthews, *supra* note 134.

¹⁴¹ *Id.*

¹⁴² Matthews, *supra* note 134.

f. The Jodi Arias Trial

Another recent trial, which attracted widespread media attention, was the trial of Jodi Arias. Arias was charged with first-degree murder of her ex-boyfriend, Travis Alexander.¹⁴³ She had reportedly stabbed him 27 times and shot him.¹⁴⁴ Arias admitted to murdering Alexander but claimed it was in self-defense.¹⁴⁵

Prior to the trial, Arias had been interviewed from jail on an episode of 48 hours.¹⁴⁶ In the interview Arias talked about her abuse and added elements of sex and religion to the discussion.¹⁴⁷ As a result, the case became popular nationwide. Once the trial began, the news coverage continued to increase and media outlets were present in the courtroom for the entire trial.¹⁴⁸ Nude photos, bloody crime scene photos, and sex phone calls between Arias and Alexander were posted on the Internet and discussed by media outlets daily.¹⁴⁹ A Lifetime movie was even made about Arias and the murder.¹⁵⁰ Social media also erupted with people discussing the case and commenting about witness' remarks during the trial.¹⁵¹ It was even reported that a witness for the defense had her life threatened by people on Twitter and Facebook.¹⁵² Given this incident and the media obsession over the trial, the defense for Arias had requested that jurors be sequestered during the trial but the request was later denied.¹⁵³

¹⁴³ Gross-Schaefer, *supra* note 77, at 4.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ Gross-Schaefer, *supra* note 77.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ Gross-Schaefer, *supra* note 77, at 7.

Arias was eventually convicted of first-degree murder, but the jurors of the first trial could not determine an appropriate sentence.¹⁵⁴ This resulted in a penalty retrial, which proved to be a prime example of how much the media can impact potential jurors. During jury selection for the penalty retrial, it was reported that over 300 jurors had been dismissed after they had told the judge they had seen too much media coverage during the first trial to make an impartial decision.¹⁵⁵ Aware of the media impact, the judge presiding over Arias' retrial had stated that there would be no video footage permitted until after a verdict is reached.¹⁵⁶

This trial began and ended as entertainment for Americans nationwide. The problem is that it conflicts with the American notion of justice. While being entertained by media coverage of an interesting case may seem harmless, it can affect a defendant's right to a fair and impartial jury. The media impact on jurors during this trial and retrial was significant and truly shows the power the media can have on a high-profile case.

g. The Michael Brown Decision

In 2014, Michael Brown, an African American male, was gunned down by a police officer Darren Wilson.¹⁵⁷ Wilson was on patrol when he had heard over the radio that a store had been robbed.¹⁵⁸ While on patrol, Wilson noticed Brown walking in the middle of the street and asked him and his companion to stop.¹⁵⁹ Brown continued walking and then, according to

¹⁵⁴ Brian Skoloff, *Dozens of Possible Jurors Rejected in Jodi Arias Case*, Huff. Post (Sept. 30, 2014), http://www.huffingtonpost.com/2014/09/30/jodi-arias_n_5905548.html.

Reason: Rule 18.2.2 requires removal of underlined hyperlink. Additionally, all citation sentences should end with a period.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ Curtis Kalin, *10 Key Facts Ferguson Grand Jury Discovered*, CNS News (Nov. 25, 2014), <http://www.cnsnews.com/mrctv-blog/curtis-kalin/10-key-facts-ferguson-grand-jury-discovered>.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

witnesses, approached the police car and began punching Wilson.¹⁶⁰ According to the record, there was a struggle of sorts between Wilson and Brown while Wilson was holding his gun.¹⁶¹ A few rounds went off inside of the car and then Wilson managed to free himself and eventually killed Brown.¹⁶²

As could be expected, the media swarmed to cover this case. The elements of murder by a police officer due to racial profiling attracted nationwide attention. Much like the George Zimmerman trial, people were split on whose side to take during this trial.¹⁶³ Some believed Wilson acted reasonably under the circumstances, and others believed Wilson used lethal force on Brown because of his skin color.¹⁶⁴

Ultimately, the grand jury determined that Wilson would not be indicted for the murder of Michael Brown. The media coverage of the grand jury decision was broadcasted on every major news stations. Soon after the delivery of the verdict, many people who believed the grand jury got the decision wrong took to the streets and began looting nearby stores.¹⁶⁵ Individuals, politicians, and celebrities nationwide expressed outrage with the decision.¹⁶⁶ Wilson was even forced to resign and had received death threats from people angered that he would not be tried for the murder.¹⁶⁷

¹⁶⁰ *Id.*

¹⁶¹ *See id.*

¹⁶² Kalin, *supra* note 156.

¹⁶³ Derek Hunter, *Americans Split On Grand Jury Decision, Disapprove of Obama's Handling*, DAILY CALLER (Dec. 2, 2014), <http://dailycaller.com/2014/12/02/americans-split-on-ferguson-grand-jury-decision-disapprove-of-obamas-handling/>.

¹⁶⁴ *See id.*

¹⁶⁵ *Outrage Across US Over Ferguson Ruling*, AL JAZEERA (Nov. 25, 2014), <http://www.aljazeera.com/news/americas/2014/11/riots-ferguson-after-no-indictment-ruling-20141125456576161.html>.

¹⁶⁶ *See id.*

¹⁶⁷ Associated Press, *Resignation of Ferguson Police Officer Darren Unlikely to Halt Protests*, FOXNEWS (Nov. 30, 2014), <http://www.foxnews.com/us/2014/11/30/ferguson-police-officer-darren-wilson-resigns/>.

While the media may not have influenced the Grand Jury decision, it certainly fueled the racial tensions felt throughout the country. It not only impacted the lives of Wilson and his family, but it impacted the lives of police officers everywhere who faced ridicule due to the decision. This trial shows how the media's reporting on a high profile case may not affect the outcome of the trial, but can affect the lives of those involved with the case. The concern is that if a similar case comes around, people will be afraid to apply the law and will remember this incident in making their decision.

h. Ray Rice

What captivates Americans more than murder a trial? The answer is sports. Americans nationwide are obsessed with sports. So, when a team's player is involved in a scandal, the media is quick to report on the incident. This happened to the starting running back of the Baltimore Ravens, Ray Rice.

On September 8, 2013, TMZ posted a video of Rice knocking out his wife in an elevator.¹⁶⁸ The video became viral as people on Twitter and Facebook continually posted and commented with outrage about the incident.¹⁶⁹ Quickly, Rice's spousal abuse garnered national attention. Prior to the release of the video, Rice had only been suspended two games for abusing his wife.¹⁷⁰ However, after the release of the video, Rice was quickly terminated from the

¹⁶⁸ Marie Alonso, *Ray Rice: A Social Media Case Study*, SOCIALMEDIATODAY (Sept. 10, 2014), <http://www.socialmediatoday.com/content/ray-rice-social-media-case-study>.

¹⁶⁹ *See id.*

¹⁷⁰ John A. Tures, *It Took a Video for Ray Rice to be Strongly Disciplined by the NFL*, HUFF. POST. (Sept. 8, 2014), http://www.huffingtonpost.com/john-a-tures/ray-rice-nfl_b_5786620.html.

Baltimore Ravens and suspended indefinitely.¹⁷¹ The Baltimore Ravens even went as far as refunding Baltimore Ravens fans for purchasing a Ray Rice jersey.¹⁷²

The impact of the media on this incident is pretty clear. If the video had never been released, Rice would probably have played the rest of the season except for the two games he was suspended.¹⁷³ He had already gone through the disciplinary process and the NFL had provided a punishment.¹⁷⁴ Though the original punishment was not nearly as severe as it should have been, given the seriousness of domestic violence, Ray Rice was essentially tried twice for the same crime.¹⁷⁵ More notably, he was tried twice because of the media attention surrounding this incident.¹⁷⁶

Fortunately, the media attention in this case did have a positive effect on the country. The video showed how horrifying domestic violence is and it helped open up the discussion on what should be done to prevent it from occurring in the future. The purpose of discussing the Ray Rice incident is to show how much of an impact the media can have on a high-profile case. In this case, the media played a major role in determining the punishment Ray Rice should receive. Whether this is fair or not, is up for debate.

IV. What Should Courts Do?

At this point, it has probably become clear that the tension between the First Amendment right of free press and the Sixth Amendment right to a fair trial has caused many issues for defendants. The courts have acknowledged that once the media reports on a case, the pool of

¹⁷¹ *See id.*

¹⁷² Tures, *supra* note 169.

¹⁷³ *Id.*

¹⁷⁴ *See id.*

¹⁷⁵ Tures, *supra* note 169.

¹⁷⁶ *See id.*

impartial jurors will shrink.¹⁷⁷ When this is an issue, the court defers the problem to a number of judicial remedies available to solve the problem. These remedies include; *voir dire*, gag orders, jury instructions, sequestration, postponement, and changes in venue.¹⁷⁸

This section will discuss the remedies employed by courts and discuss whether or not they help ensure that a defendant will have the right to a fair trial.

a. Voir Dire

Voir dire is a judicial remedy used to prevent biased jurors from being selected to the jury panel.¹⁷⁹ The theory behind voir dire is that through questioning, conducted by the defense and the prosecution, any jurors who have a bias or prejudice surrounding the case-in-question will not be permitted to be on the jury panel.¹⁸⁰ The Appellate courts place great weight on through voir dire proceedings.¹⁸¹ Thus, once the process is over, the selected jurors are presumed to be impartial.¹⁸²

While voir dire appears to be an adequate way to weed out biased jurors, it is not entirely effective when the media reports on a high-profile case.¹⁸³ To find a juror, especially in present times, who has not heard about or formed an opinion regarding a high-profile case that is featured on the news is very difficult, if not impossible.¹⁸⁴ Furthermore, even if a juror is found who has no knowledge at all regarding a high profile case, in theory, that juror should not be

¹⁷⁷ Landman, *supra* note 8.

¹⁷⁸ Robert S. Stephen, *Prejudicial Publicity Surrounding a Criminal Trial: What a Trial Court Can Do To Ensure a Fair Trial in the Face of a "Media,"* 26 SUFFOLK U. L. REV. 1063, 1084-90 (1992).

¹⁷⁹ Stephen, *supra* note 177.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *See id.*

¹⁸³ Charles H. Whitebread, *Selecting Juries in High Profile Criminal Cases*, GREEN BAG 195 (1999), http://www.greenbag.org/v2n2/v2n2_articles_whitebread.pdf.

¹⁸⁴ *Id.*

permitted to be on the jury panel at all. The purpose of the jury is to represent the conscience of the community and when a person has not even heard about a highly publicized court case, that person is out of touch with what is going on in the community and thus, cannot represent the conscience of the community effectively.¹⁸⁵ For this reason, finding a juror who is able to represent the community and who has not developed a bias in a highly publicized case can be a long, expensive process.¹⁸⁶

b. Sequestration

Sequestration is another remedy courts will implement when high-profile court cases are publicized by the media.¹⁸⁷ Sequestration involves removing jurors from their community in an attempt to make sure jurors render a verdict based solely on the facts of the trial and not on extraneous information heard through the news, friends, or family members.¹⁸⁸

Sequestration, in practice, can be very expensive.¹⁸⁹ The cost associated with sequestering a jury includes room, board and entertainment for the jurors.¹⁹⁰ The cost associated with sequestering a jury includes room, board, and entertainment for the jurors.¹⁹¹ In the Casey Anthony trial, it had cost around \$360,000 to sequester the jury.¹⁹² Even more astounding was the O.J. Simpson trial, which has nearly cost three million dollars to sequester the jury.¹⁹³ For this reason alone, sequestration can be unfavorable.

¹⁸⁵ *Id.*

¹⁸⁶ Whitebread, *supra* note 182.

¹⁸⁷ *See id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ Whitebread, *supra* note 182.

¹⁹² Jeff Welty, *Jury Sequestration*, NCCL (Sept. 20, 2011), <http://nccriminallaw.sog.unc.edu/jury-sequestration/>.

¹⁹³ Jeff Welty, *Jury Sequestration*, N.C. CRIM. L. (Sept. 20, 2011, 10:08 AM), <http://nccriminallaw.sog.unc.edu/jury-sequestration/>.

Another problem with sequestration is the toll it can have on the psyche of jurors who are removed from their homes.¹⁹⁴ If a trial lasts a long time, the fear is that jurors will rush to a verdict so they can go home.¹⁹⁵ If this should happen, the entire idea behind sequestration can be counter-productive and result in an unfair trial for the defendant due to the financial and social costs that result.¹⁹⁶

c. Change of Venue

When the media, in a certain locality, highly publicizes a case that occurred in that area, sometimes the courts will change the venue to a place outside that locality in the hopes that the new location will provide the court with a pool of jurors that aren't tainted by the media's publications.¹⁹⁷ This can be an effective remedy if the case does not receive media attention nationwide.¹⁹⁸

However, with the increase in technological advances, particularly iPhones, Twitter, Facebook and widespread coverage, changing the venue does not usually make a difference in high-profile cases.¹⁹⁹ In fact, it can be expensive to relocate the trial only to find that another pool of jurors who has been influenced by the extensive media coverage of the trial.²⁰⁰

¹⁹⁴ Whitebread, *supra* note 182.

¹⁹⁵ Whitebread, *supra* note 182, at 195.

¹⁹⁶ *Id.*

¹⁹⁷ Stephen, *supra* note 177.

¹⁹⁸ *Id.*

¹⁹⁹ Whitebread, *supra* note 182.

²⁰⁰ *Id.*

d. Postponement

Postponement is a remedy that delays a trial from proceeding when a case is highly publicized by the media.²⁰¹ The theory under this remedy is that over-time people will lose interest in a story or, better yet, the media will cease to report on the case and then the trial can begin.²⁰² Postponement is not highly utilized and it may not be very effective for a number of reasons.²⁰³

First, postponement brings constitutional concerns into question.²⁰⁴ The Sixth Amendment provides a defendant with a “speedy trial.”²⁰⁵ Postponement undermines this notion of a speedy trial because it delays the trial until a later time.²⁰⁶ Second, even as time passes, the media may not report on the case until the trial begins.²⁰⁷ Thus, once the trial starts up again, the media will regain interest and begin reporting on the trial again.²⁰⁸ Lastly, this process can affect the fairness of the trial.²⁰⁹ Over-time witnesses’ memories will be less accurate and reliable. Ultimately, the defendant could be in a worse position after the delay in the trial.²¹⁰

e. Jury Instructions

In high-profile cases, the judge will usually instruct the jury to disregard any statements made about the case, which they may have heard through the media or any other outside sources.²¹¹ In almost every case, the judge will instruct the jury to make a determination based

²⁰¹ Stephen, *supra* note 177.

²⁰² *Id.*

²⁰³ Whitebread, *supra* note 182 at 195.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ Whitebread, *supra* note 182 at 195.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ Stephen, *supra* note 177.

solely upon the evidence presented at trial.²¹² In the social media and smart phone age, many jury instructions are tailored to prohibit jurors from accessing Facebook, Twitter, YouTube, and looking up the case on the Internet.²¹³

While the judge's instructions do in fact hold great weight, it can be nearly impossible for a juror to disregard something he or she may have heard from the media or any other source regarding the case he or she is assigned to. Furthermore, as cases such as *Dimas-Martinez v. State* indicate, many jurors disregard the instructions.

f. Gag Orders

Gag orders are orders given by the trial court that restrict communications of trial participants with the media as soon as the trial has commenced.²¹⁴ Gag orders are a favorable remedy in that they do not infringe on the media's First Amendment right to attend trials and report on a given case.²¹⁵ The purpose of this remedy is to ensure that information not presented during the trial is not given to the media because if the media reports on this information, potential jurors may develop strong biases and the defendant's right to a fair trial may subsequently be threatened.²¹⁶

In Sheppard v. Maxwell, the court, for the first time, discussed the possibility of gag orders and determined that the trial court should have prohibited communications with trial participants and the media.²¹⁷ Sheppard was a high-profile case about a doctor who had

²¹² *Id.*

²¹³ *See id.* at 1090.

²¹⁴ *Id.* at 1084.

²¹⁵ *See id.* at 1092.

²¹⁶ *See* Stephen, *supra* note 177, at 1083.

²¹⁷ *See id.* at 1074.

murdered his wife.²¹⁸ This case was highly publicized and the media reported on many aspects of the case that were not presented at trial.²¹⁹ First, the media reported on the fact that Dr. Sheppard had refused a lie detector test.²²⁰ Second, the media had written an article entitled “Why isn’t Sam Sheppard in Jail?” before Dr. Sheppard had been arrested and charged with murder.²²¹ Furthermore, the media was present while a coroner was questioning Dr. Sheppard.²²² Subsequently, the court determined that a gag order should have been provided.²²³ In response to this prejudicial media coverage, the court stated that “the trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters, such as the refusal of Sheppard to submit to interrogation or take any lie detector tests; any statement made by Sheppard to officials; the identity of prospective witnesses or their probable testimony; any belief in guilt or innocence; or like statements concerning the merits of the case.”²²⁴ Furthermore, the court stated that media outlets should have been warned about the impropriety of publishing material not introduced in the proceedings.²²⁵

While gag orders do reduce the chance of an unfair trial, these orders are not entirely effective.²²⁶ They merely limit the sources from which the media may derive information.²²⁷

²¹⁸ *Id.* at 1071.

²¹⁹ *Id.* at 1072.

²²⁰ *Id.*

²²¹ Stephen, *supra* note 177.

²²² *Id.*

²²³ *Id.* at 1074.

²²⁴ *Sheppard v. Maxwell*, 384 U.S. 333, 360 (1966).

²²⁵ *Id.* at 362.

²²⁶ Jaime N. Morris, *The Anonymous Accused: Protecting Defendant’s Rights in High Profile Cases*, 44 B.C. L. Rev. 901, 924 (2006), https://www.bc.edu/content/dam/files/schools/law/lawreviews/journals/bclawr/44_3/06_FMS.htm.

²²⁷ *Id.*

The media may still report on the name of the defendant and the charges against him or her because this information is easily accessible without questioning trial participants.²²⁸

Even with these remedies in place, media coverage of high-profile cases may still affect the outcome of the case.

V. Conclusion

There is no question that technological advances in social networking and access to information are important aspects of our everyday lives. However, as the foregoing discussion mentions, the use of these technological advances by the media has created many complexities for the field of law. As many of the cases discussed indicate, when the media reports on a high profile case, the media has the power to shape how people feel about the accused. In many cases, the media paints him or her to be a villain, and for good reason, villains fascinate people.

While there are many remedies in place to help ensure that defendant's receive a fair trial, many of these remedies fall short. New remedies need to be considered and media outlets should, at the very least, be more responsible when reporting on a trial. As was discussed in the cases above, even when a defendant is determined to be not guilty, sometimes their reputation is so damaged by the media attention; the chance to have a normal life may not be possible.

This paper has sought to shed light on a problem that could continue to become a huge issue in the future. As technology continues to advance and information becomes easier to access, defendants in high profile cases may be at a high risk of having an unfair trial.

²²⁸ *Id.*

Auto-Correct: Changing Sua Sponte to Sea Sponge;
a Mixed Blessing for Attorneys

Robert D. Lang ¹

There was a time, no so long ago, when lawyers, especially at large law firms, hired proofreaders to review closing documents and legal memoranda. Typically, the proofreaders were graduate students looking to earn some money at night while attending classes during the day. The proofreaders were usually placed in windowless offices where they had little or no contact with the personnel of the law firm—their job was to review documents, not to converse. Proofreaders performed a valuable function. As one stated:

“I spent nearly 22 years correcting transcripts. A couple of my transcript finds: ‘Oxymoron’ came out ‘Nazi moron.’ ‘Panacea’ came out ‘Pan of sea.’”²

These grad students, who once served in a crucial role, have largely been replaced by spell-check and auto-check, at a large cost savings for law firms. Of course, this presupposes that computers function accurately and solve, rather than create, problems in the language of documents.

Enter auto-correct, or “auto-fail,” designed to save time and money and catch mistakes in the final work product. However, the hidden danger of auto-correct itself often goes wholly unrecognized: the creation of entirely new words and new phrases, none of which were intended

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² Zay N. Smith, *I’d Like to Thank the Academy Again, in 2041*, CHICAGO SUN TIMES (Mar. 7, 2006).

by the drafter. The PG version of auto-fail has caused loving posts by grandmothers to change “grandma” to “grandmaster.”³

Such is the effect of auto-correct: new words can be created which, if not corrected (re-corrected?), become accepted words on their own. This is commonly referred to as the Cupertino effect: auto-correct replaces misspelled words or incorrect words, which are not in the dictionary. Cupertino is a city in Northern California where Apple and other silicon-valley computer companies are headquartered. Replacement of the misspelled word “cooperation” with “Cupertino” resulted in that suggestion making its way into documents published by NATO, the United Nations, and other official bodies.⁴

One famous example of how auto-correct can backfire on attorneys is the lawyer who, in his appellate brief to the 9th Circuit Court of Appeals, had auto-correct change “*sua sponte*” to “Sea Sponge,”⁵ resulting in the sentence, “it is well settled that a trial court must construct sea sponge on any defense, including the matter of fact defense.”

It is ironic that lawyers who have made drafting mistakes due to auto-correct may be catapulted back several hundred years to cite cases involving a “scrivener’s error” to avoid being sued for malpractice and to reform agreements and trusts, codicils and contracts. The modern technology “tool” of auto-correct is to blame. Older lawyers who still rely on rolodexes and may even prefer to have a secretary come in to take dictation, will nod their heads (often with more

³ Jessica Bennett, *Autocorrect Gets Personal*, N.Y. TIMES, Jan. 9, 2015

⁴ Ben Zimmer, OUPblog, *When Spellcheckers Attack: Perils of the Cupertino Effect*, Oxford Univ. Press (Nov. 1, 2007), <http://blog.oup.com/2007/11/spell-checker/>.

⁵ Jacob Gershman, *Fear-Based Instruction Can be Harmful to Law Students, Says Paper*, THE WALL STREET JOURNAL, Sept. 2, 2014

than a little gray hair) knowingly. Those lawyers who eagerly embrace technological changes in the practice of law may well have different comments to make.

The General Counsel for the Jacksonville Jaguars of the National Football League was fired for a “scrivener’s error” which created a potential liability of approximately \$4 million to the team. His draft of the contracts for the 7 assistant coaches held that the contracts “shall terminate on the latter of January 31, 2012 with a day after the Jaguars’ last football game of the 2012 season and playoffs . . .”. The intent was that the contracts would terminate on the last day of 2011, not the 2012, season. By definition, whether or not the Jaguars make the play-offs (a somewhat dubious proposition which is a subject for another article), the last game with a 2012 season would necessarily be in January 31, 2012 to 2012, as the NFL season does not begin until the Fall of 2012.⁶

The slightest mistake of language can have the most severe consequences. Last year, when Orrick, Herrington & Sutcliffe announced the opening of an affiliated office in Ivory Coast, what should have been a positive event instead resulted in adverse publicity. The two attorneys who had practiced in the affiliated office were “conseil juridique” and could not appear in court proceedings. However, the French translation of the press release described the two attorneys as “avocats,” who are governed by the local bar association and can offer legal advice on all matters and appear in the Ivorian courts to which they are admitted. The President of the Cote D’Ivoire Bar Association objected to the French description of the rolls of the two attorneys and publicly stated that fraudulent use of the title of “avocat” in Cote D’Ivoire exposed the said individuals to

⁶ Matt Breedan, *Jags Fire General Counsel Over Scrivener’s Error?*, BREEDAN LEGAL (Jan. 16 2012), <http://breedenlegal.com/2012/01/16/jags-fire-general-counsel-over-scriveners-error/>.

criminal prosecution. The French version of the Orrick public announcement was revised. The law firm stated that they “regret the error in the French translation of our press release.”⁷

There are any number of “old-school” techniques useful to double-check for errors which auto-correct may miss or even create. Using different fonts on changes; red-line copies; being even more, not less vigilant when cutting-and-pasting, or even having a standard editing agreement with a colleague so that you review his/her work with the favor returned.⁸

When courts are asked to view such errors, they often reach back to the old case law involving scriveners and drafting errors. When one thinks of scrivener, the image that may come to mind is from Dickens, with a frail old man, bent over, wearing reading glasses, methodically looking over documents by the feeble light of a single candle while methodically reviewing rows and rows of numbers from dusty ledgers for hours on end. He could well be counting and re-counting the results of the Sorting Hat, whereby new students at Hogwarts are assigned to Gryffindor, Hufflepuff, Ravenclaw, and Slytherin.

Applying these well-settled scriveners’ principles to modern day auto-correct errors does not necessarily compel the conclusion that lawyers will not automatically escape the consequences of these errors.

In *Minnesota Lawyers Mutual Insurance Company v. Batzli*,⁹ an attorney failed to draft an agreement conveying an interest in property because he failed to notice an omission of certain

⁷ Nathalie Pierrepont, *Orrick’s New Abidjan Office Sparks Harsh Words From Local Bar*, THE AMERICAN LAWYER (Nov. 3, 2014), <http://www.americanlawyer.com/id=1202675395899/Orricks-New-Abidjan-Office-Sparks-Harsh-Words-From-Local-Bar-?slreturn=20150929184653>.

⁸ Gordon, *Legal Writing Tips; In Auto-Correct Era, Be Vigilant With Typos*, Bar Association of San Francisco (Feb. 2012).

⁹ *Minn. Lawyers Mutual Insurance Co. v. Batzli*, 442 F. App’x 40 (4th Cir. 2011).

property interests before the parties signed the agreement. Having realized his drafting error, the attorney discussed several options with his client and tried to move for a correction of the agreement on the grounds that he had made a scrivener's error when he drafted the agreement. However, the lower courts found that there was insufficient evidence to indicate that the drafting error was due to such an error and the Court of Appeals of Virginia affirmed the Circuit Court's denial of the scrivener's error motion.

Subsequently, the client filed a malpractice suit against the attorney drafter and his carrier. The client filed a declaratory judgment action in the Eastern District of Virginia. Even though he was required to defend a malpractice action, the attorney drafter, arguing at the time that he filed the scrivener's error motion, was aware of facts that he knew, or should have known, would support a claim for money damages against him. The attorney drafter, in response to the demand for a counter-claim seeking declaratory judgment that his malpractice carrier, was obligated to defend him against the malpractice suit brought by his client and to indemnify him. Motions and cross-motions were denied.

At trial, the central issue was whether the attorneys' notice to involve practice carrier failed to comply with the policy's notice provisions. The District Court denied the carrier's motion for summary judgment on the alleged late notice of claim, noting that the client never indicated an intention to sue. The carrier maintained that positive attorney-client relationship with the lawyer for some time.

On appeal, the Fourth Circuit Court of Appeals found that the jury had sufficient evidentiary basis to conclude if the attorney reasonably thought that his drafting error would not result in a claim from his client though one was filed. Circuit Judge Shedd dissented, finding that

the liability policy required only that the insured report an act, error or omission that would support a demand for damages, not that the demand would ultimately be successful, and that the fact that the attorney drafter was “shocked” that his proceeding to correct the error was denied was irrelevant. The attorney drafter knew he had made an error, candidly conceded “that he felt sick about it and had lost sleep over it.”¹⁰ Accordingly, the dissent found that there had been an error and that the attorney knew of the error and had failed to report the error timely to his carrier.

In *Berrios v. Jevic Transportation, Inc.*,¹¹ summary judgment was sought in an action by plaintiff to reform an insurance policy due to an alleged scrivener’s error. The policy limit, \$1 million, was changed to \$2 million; however, the increase in the policy on the documentation that was generated had a November 12, 2000, rather than November 12, 2001, effective date.

The court likened the alleged scrivener’s error to a matter of mutual mistake of fact which can often be traced to a typo or transcription error, of which there were many in the 19th century. The court further held that the parole evidence rule does not bar admission of extrinsic evidence related to unambiguous contracts where there is a mutual mistake and the agreement fails to reflect the prior complete understanding of the parties. The court concluded that there was a genuine issue of material fact as to when the coverage was to commence and that the parties would have to prove at trial that reformation of the policy coverage on account of mutual mistake was justified.

In *Schneider v. Winstein*,¹² a legal malpractice suit was brought against an attorney at his law firm because that lawyer, in the context of a divorce agreement, failed to determine the implications of the difference in language between “\$50,000 out of the husband’s share” and “the

¹⁰ *Id.* At 55.

¹¹ See *Berrios v. Jevic Transp., Inc.*, 2012 R.I. Super. LEXIS 40 (Super. Ct. 2012).

¹² See *Schneider v. Winstein*, 2014 Ill. App. Unpub. LEXIS 528 (Ill. App. Ct. 3d Dist. 2014).

first \$50,000,” when reviewing the terms of the judgment for the purpose of filing a post-trial motion. At trial, the court found that the plaintiff had waited more than two years before filing her malpractice complaints, although she had been aware for at least three years that she had a potential claim against her attorney. Addressing her claims, the Appellate Court noted that the court below implicitly found the language at issue constituted something other than a clerical or scrivener’s error.¹³

In *Westgate at Williamsburg Condominium Association, Inc. v. Philip Richardson Co.*,¹⁴ a site plan for the development of a condominium failed to include a specific important parcel of land as part of the metes and bounds description. Although a number of changes were suggested prior to the closing, the property description failed to include the parcel in question. The trial court found that the description of the parcel was a scrivener’s error. On appeal, the Supreme Court of Virginia reversed, holding that the error was neither typographical nor clerical, nor was there evidence that the description of a property had been improperly transposed and recited an erroneous deed book reference. The court found:

“[T]he fact that a party’s intent was not fully reflected cannot be attributed to an error of scrivener instead, the error lies with the party’s inattention to the detail before him.... Mr. Kotarivs, himself, admitted: ‘[He] didn’t look at [the property description and plat] carefully enough’.”¹⁵

In *International Union of Electronic v. Murata Erie North America, Inc.*¹⁶, the language in a Pension Plan was incorrectly re-drafted following Congress’s enactment of ERISA. The Federal Court held that it was an issue of fact as to whether there was clear, precise convincing proof of

¹³ *Id.* at 18.

¹⁴ See *Westgate at Williamsburg Condo. Ass’n v. Philip Richardson Co.*, 621 S.E.2d 114 (Va. 2005).

¹⁵ *Id.*

¹⁶ *Int’l Union of Elec., v. Murata Erie N. Am., Inc.*, 980 F.2d 889, 907 (3d Cir. 1992).

scrivener's error in the ERISA context so as to permit the importation of the equitable doctrine of reformation of contract. The Third Circuit recognized that a document may be reformed based upon parole evidence as a result of a mistake scrivener in drafting a document, and further held that the application of the scrivener's error doctrine would be appropriate if the evidence shows that there would be a windfall of one of the parties as a result of such an error.¹⁷

One lesson well-learned from Watergate is that the cover-up can be worse than the original act of poor judgment. So too, when law firms discover that a scrivener's error has been made. In addition to the risk of not promptly notifying their malpractice carrier, thereby running the risk of losing insurance protection for which they have dearly paid, they run the risk of infuriating their client for whom the work performed or not performed, as the situation may be. Consider the \$150 million malpractice suit filed in April 2007 by Charter Communications Inc. against their attorneys. The company had asked its lawyers to draft a provision that would automatically convert stock held by the co-founder of Microsoft into the stock of another company. The provision was added but an associate of the law firm later removed that provision from the final version of documents. The error was not caught at the time when the papers were executed in February of 2000. In October 2002, during a routine review, the error was located. The client found that not only had the partners of the law firm known about the mistakes six months before they told the client, but they also billed the client for time spent trying to correct their mistake.¹⁸ One can imagine how billing the client for efforts to correct the firm's own error might have contributed to the client's anger upon discovering the error.

¹⁷ *Int'l Union of Elec.*, 980 F.2d at 907, 1992 U.S. App. LEXIS at 31295.

¹⁸ Aruna Viswanatha, *A Cable Deal and an Associate's Error Spell Trouble for Irell*, The Recorder (Cal. July 3, 2007); Peter Lattman, *Charter Communications Sues Irell & Manella for \$150 Million*, Wall St. J. (Apr. 9, 2007), <http://blogs.wsj.com/law/2007/04/09/charter-communications-sues-irell-manella-for-150-million/>.

In *Glepco, LLC v. Reinstra*,¹⁹ a married couple bid on a property at foreclosure sale, believing they were to acquire a three acre lot with a house on it. However, after the sale, they discovered that the legal description of the property described only the field portion of the land, and not the structure. While successfully buying the property, the couple brought an action to quiet title and reform the deed because of the erroneous legal description, which they argued was a result of a scrivener's error. The trial court granted the action to reform the title, determining that the legal description of the property did not express the full intentions of the bank and the prior owners, and was a result of a mutual mistake or scrivener's error. On appeal, the Washington Appellate Court affirmed, finding that the legal description of the property was inadequate due to the scrivener's error. In the end, the deed of the property correctly described the real estate that was purchased at the foreclosure sale.

In short, time-pressed attorneys appreciate autocorrect because it allows for typing and word processing "on the go." However, busy lawyers who do their drafting at the last minute may not allow sufficient time to review their own work for mistakes, and may therefore miss or switch letters in such keywords as "statute" or "statue." Moreover, with technology comes the elimination of the practice of having third parties proofread documents meticulously. Accordingly, simple drafting mistakes may prove more common, as is evident from the recent case law that hearkens back to the Dickensian days of scribes.

The easiest way to avoid these errors is both evident and obvious; take sufficient time in drafting; use spell check, with no automatic replacement; disconnect auto-correct; proofread and

¹⁹ Leslie A. Gordon, *Legal Writing Tips: In Auto-Correct Era, Be Vigilant With Typos*, Bar Ass'n of San Francisco (Feb. 2012).

re-read twice. If this is done, references to *sua sponte*, even if seemingly magically transformed into sea sponge, will be caught and corrected before the papers leave the office and are sent to clients, the adversary and the court.

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Organ Transplants from Executed Prisoners

Reviewed By: Ariana Doty ¹

Citation: Louis J. Palmer, Jr., *Organ Transplants from Executed Prisoners* (1999).

Relevant Legal and Academic Areas: Constitutional Law, Criminal Law, Property Law, and Theories of Punishment.

Summary: This book discusses and provides compelling reasons why society should take organs from prisoners on death row after they have been executed and use them as transplantable organs for those in need. This book provides a step-by-step analysis how if enacted, a statute allowing for this would not have any negative constitutional implications and demonstrates the basic reasons why this would benefit society as a whole.

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Ch. 1: Creation of Rights in a Corpse

Origin and meaning of common law

In determining whether or where the creations of rights in corpse come from, the term common law needs to be properly explained.² In the early history of England, there were two types legal systems, the temporal system and the ecclesiastical system.³ The temporal courts developed what we call common law with the purpose of having a uniform legal principles that have the force and effect of legislative law but were developed by judges in English temporal courts, and now here by American judges.⁴

Common law no-property rule

Although a corpse is an inanimate object, common law did not distinguish between animate and inanimate objects, rather they grouped both objects under the term property and gave citizens rights to property.⁵ The exception was a human corpse, which common law did not deem property and did not permit others to claim rights to it. This was known as the “no-property rule” and was demonstrated by cases pronouncing this to be the rule under which treatment of corpses would be guided.⁶ The first case which provided the foundation for the no-property rule was Haynes, in a 1614 English judicial opinion referred to human corpses as a “lump of earth,” stating that they had no capacity to possess anything, but did not address whether a corpse had protectable rights.⁷ It was not until 1749, in Exelby v. Handyside, where the court held “there

² LOUIS J. PALMER, JR., ORGAN TRANSPLANTS FROM EXECUTED PRISONERS (1999).

³ *Id.*

⁴ *Id.* at 8-9.

⁵ *Id.* at 9.

⁶ *Id.* at 10.

⁷ PALMER, *supra* note 1 at 10.

existed no property rights in dead bodies,” that the no-property rule was fully established.⁸

Common law also established that a living person could not dispose of his or her corpse by will and that no relative on a decedent had legal standing to control the corpse’s disposition because there is no property right in a corpse, therefore no court could enforce the disposition of a corpse by will or other instrument.⁹

Common law justified the no-property rule on two grounds. The first was that a corpse was “a valueless object that belonged to no one, except for perhaps God” because no benefit could be derived from it and therefore it could not constitute property and could not be given protection under the law.¹⁰ The second was that common-law courts had jurisdiction over burial sites and monuments, which were property, and ecclesiastical courts had jurisdiction over the actual corpse so common-law did not provide much literature on the treatment of corpses.¹¹ Some exceptions to the no-property rule were the prohibitions of arresting a dead body and libeling a dead body, which were inconsistent with the no-property rule.¹² The duty to bury a corpse was also established to eliminate the nuisance caused by the smell of a decaying corpse, however this was not inconsistent with the no-property rule because the duty was not enforced by giving property rights to the corpse.¹³ Also, the duty did not mean that the corpse specifically had to be buried; it just had to be disposed of. In accordance with this duty was the prohibition of disinterring a corpse, because it would be useless to have a law giving a duty to bury a corpse if it could just be dug up.¹⁴ Lastly, common law permitted the selling of corpses

⁸ *Id.* at 11.

⁹ *Id.* at 12-13.

¹⁰ *Id.* at 13.

¹¹ *Id.*

¹² PALMER, *supra* note 1, at 15

¹³ *Id.* at 15-17.

¹⁴ *Id.* at 19.

for the purpose of dissection and experimentation by someone in legal possession, and the dissection at anatomy schools was permitted as a part of a capital felon's death sentence.

Initial use of no –property rule in America

In early America, corpses fell under the no-property rule, however there were four main issues that disrupted American courts.¹⁵ The first was mutilation of a corpse whereby courts held that because there was no such thing as property rights in a corpse, there is no lawsuit for civil damages regarding injury to said corpse.¹⁶ The second issue was digging up a corpse, where the courts prohibited disinterment of a corpse but would not provide monetary damages to a plaintiff in a lawsuit.¹⁷ The third issue, holding a corpse for payment of a debt was permitted, even though a corpse could not be formally arrested in a debt dispute.¹⁸ The fourth issue, disposing of a corpse by will was also not permitted because there was no property in a dead body.¹⁹

American Courts Develop Quasi- Property Rule

The abrupt shift in the way in which American Courts treated a corpse occurred with the development of the “quasi-property rule.” This rule was said to have been established to protect the integrity of corpses and respected the decedent's mourning relatives.²⁰ The foundation of the quasi-property theory created (1) the right to bury a corpse and preserve its remains; (2) this right belongs to next of kin, if there is no testamentary disposition; (3) the right to protect the remains includes preserving them by separate burial and choosing and changing the place of sepulture;

¹⁵ *Id.* at 20.

¹⁶ *Id.* at 21.

¹⁷ PALMER, *supra* note 1, at 22.

¹⁸ *Id.* at 23.

¹⁹ *Id.* at 24.

²⁰ *Id.*

and (4) if the burial place is taken for public use, the next of kind can be indemnified for the expenses of removing the corpse and re-interring the remains.²¹ Following the quasi-property rule, American courts began to provide compensation for mutilation of a corpse; unauthorized autopsy; unauthorized removal of a body part; and failing to turn over a corpse.²² The justification for deciding that a corpse was quasi-property was to provide consistency by using the word property so that the law could afford it protection but to also establish that not all of the legal principles applying to pure property were applicable to quasi-property.²³

Currently, a corpse's rights as quasi-property include: (1) the right to dispose of one's corpse by will; (2) the right of relatives to have possession of the corpse; (3) the right of relatives to bury the corpse; (4) the right of relatives to have a corpse removed to a different grave; (5) the provision of criminal sanctions for disinterring a corpse without authority or proper relationship; (6) the right of relatives to prevent the removal of body parts; (7) the right of a decedent to determine by will the disposition of his or her body parts; (8) the right to prevent an autopsy; (9) the right to burial where the closest relative desires; (10) the right to sue over delay in the delivery of a corpse; (11) the right to file suit for exposing a corpse to bad weather; (12) the right to monetary award for an outrage or indignity done to a corpse.²⁴

²¹ *Id.* at 26.

²² PALMER, *supra* note 1, at 28.

²³ *Id.* at 30.

²⁴ PALMER, *supra* note 1 at 30.

Ch. 2: The Market for Human Body Parts

New Advances In Medical Science Unfulfilled Demand For Body Parts

Currently, there are approximately 25 organs that can be transplanted from a cadaver to a live donee.²⁵ The first successful organ transplant was a kidney from a live donor in 1954. Breakthroughs in science have allowed for more transplants to be conducted more frequently and the creation of immunosuppressive drugs have increased the likelihood that a donee will not reject the transplanted organ.²⁶ Still, between six and nine Americans die each day waiting for an organ.²⁷

In order to combat the increasing demand for transplantable organs and insufficient supply, China participates in the international black market in human body parts by removing all transplantable organs from executed prisoners and selling them to the highest bidder.²⁸ It has been estimated that this will be a one hundred billion dollar market by the start of the next millennium.²⁹ “The real tragedy behind the death of donees waiting for organs is that the organs exist to fill the demand but are unavailable to the market in the United States.”³⁰

Sale of Body Parts Prohibited

In 1984, Congress enacted the National Organ Transplant Act (“NOTA”) in response to the increasing success of organ transplantation.³¹ NOTA authorized the creation of the National Organ Procurement and Transplantation network to set up procedures for matching donors and

²⁵ *Id.* at 32.

²⁶ *Id.*

²⁷ *Id.* at 34.

²⁸ *Id.* at 33.

²⁹ PALMER, *supra* note 1 at 33.

³⁰ *Id.* at 34.

³¹ *Id.*

donees and it also made it a federal offense to sell human body parts in interstate commerce.³² Some critics have stated that removing a monetary incentive has deprived the nation's organ bank and promoted the black market trade of organs and that Congress was incorrect in its assumption that selling organs for profit would be against social norms.³³

Current Method of Obtaining Body Parts

Under the current system, called the donation-based organ supply system ("D-BOSS"), donors can only voluntarily give up their organs, without compensation.³⁴ This system is regulated by the Uniform Anatomical Gift Act ("UAGA"), which provides among other things, the manner of executing anatomical gifts and prohibition of sales and purchases of human organs.³⁵ The inefficiency of this system to rely on the compassion of individuals to just give up an organ contradicts our nation's deeply-rooted notion to use profit as motive.³⁶

Proposals for Commercializing the Body-Part Market

An alternative to the D-BOSS system is the futures-market organ supply system ("F-MOSS").³⁷ Several models for this system have been put in place. First, the Schwindt-Vining F-MOSS Model provides that the donor and government purchaser would contract for immediate compensation to the donor in exchange for the buyer's rights to harvest the transplantable organs

³² *Id.* at 34-35.

³³ *Id.* at 35.

³⁴ PALMER, *supra* note 1 at 35.

³⁵ *Id.* at 35-36.

³⁶ *Id.*

³⁷ PALMER, *supra* note 1 at 36.

upon the donor's death.³⁸ The amount paid to the done would be based on the inventory needs of the purchaser and the contract could only be rescinded if both parties were to agree.³⁹

The Hansmann F-MOSS Model provides that a large health-insurance corporation would contract with the donor requiring the company to immediately pay the donor a certain amount based on prices set by the competitive market for the donor's organs at death.⁴⁰ The decedent could also provide for the sale of his/her organs by his/her heirs in specified in a will.⁴¹

The Cohen F-MOSS Model allows for a government or private entrepreneur to contract with a donor for contingent compensation based on administrative figures or market demand that is not paid directly to the donor, but would go to his estate upon death after the transplantable organs are harvested.⁴² This model projects compensation up to 30,000 dollars and would allow a hospital to be sued by the estate if they did not provide notice of the donor's death to the buyer and preserve the organs in a harvested state.⁴³

Last, in the Crespi F-Moss Model the buyer (not specified whether the buyer has to be a government or private entity) pays a sum based on market demand to the donor's estate upon death on the condition that the buyer actually harvests the organs.⁴⁴ The donor would be able to unilaterally terminate the contract before death and could not assign away the proceeds from the contract.⁴⁵ Also, this model would allow for the decedent's relatives to sell the decedent's organs even if he had not contracted to do so while alive but the proceeds would go to a nonprofit organization or church.⁴⁶ Additionally, the federal government would have to establish a national

³⁸ *Id.* at 36-37.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² PALMER, *supra* note 1, at 38.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 38-39.

⁴⁶ *Id.* at 39.

registry for transplantable organ contracts and hospitals would have a duty to notify the registry, along with the buyer of the donor's death.⁴⁷

With the need for transplant increasing every year in our nation and the increasing success of transplants, following a basic chain of supply and demand would suggest the need for a free market for organs. By making the sale of transplantable organs illegal but permitting the voluntary donation of transplantable organs we are hurting both the donor, who will have to undergo surgery and have to recover, and the potential donees that die every day due to a shortage of organs. The fact that people in need are willing to buy organs unsafely on the black market shows how desperate they are and what the individuals of this nation are willing to go through for the possibility at life.

Ch. 3: Removing Transplantable Organs of Capital Felons

Statutory Disposal of Corpses

Today, 38 states and the federal system allow the death penalty for capital murder. One former capital-punishment jurisdiction allowed for the dissection of the convict's corpse after his execution for medical experimentation.⁴⁸ An extension of this would be to have all capital-punishment jurisdictions harvest these organs as a part of the death sentence and distribute them through the D-BOSS system.

There are five statutorily recognized dispositions for corpses of executed prisoners, all of which are consistent with the recognition of corpses as quasi property.⁴⁹ The five types of dispositions are to (1) permit relatives to take the corpse; (2) permit a friend to take the corpse;

⁴⁷ PALMER, *supra* note 1, at 39.

⁴⁸ PALMER, *supra* note 1, at 41.

⁴⁹ *Id.* at 42.

(3) permit a person designated by the felon to take the corpse; (4) permit the unclaimed corpse to be donated to a medical center or physician; (5) permit the unclaimed corpse to be buried by the jurisdiction.⁵⁰

Removing Organs as Part of the Death Sentence

There are two reasons why no American court has been given authority to order removal and transplantation of an executed prisoners organs.⁵¹ The first is the impact of *Furman* and the second is our uninformed public.⁵²

In 1972, the United States Supreme Court held in *Furman v. Georgia*, that the death penalty was imposed in an arbitrary and capricious manner violating the Eight Amendment.⁵³ Justice William Douglas stated in his concurring opinion that by making the death penalty discretionary, judges and juries can selectively apply it allows prejudice and discrimination to be part of the decision which violates equal protection and the ban on cruel and unusual punishment by allowing for the unequal distribution of justice.⁵⁴ This case did not hold that the death penalty was unconstitutional; it held that the method used to determine who was to receive the death penalty violated the Constitution.⁵⁵

In 1976, the Supreme Court approved new death-penalty procedures enacted by Georgia in *Gregg v. Georgia* whereby capital prosecution was divided into two stages, the guilt phase and the penalty phase.⁵⁶ One alteration was that before a defendant was sentenced to death the jury or

⁵⁰ *Id.*

⁵¹ *Id.* at 43.

⁵² *Id.*

⁵³ PALMER, *supra* note 1, at 43.

⁵⁴ *Id.* at 43-44.

⁵⁵ *Id.* at 45.

⁵⁶ *Id.*

trial judge had to find that 1 out of 10 statutorily defined aggravating circumstances were present beyond a reasonable doubt.⁵⁷ After *Gregg*, a majority of jurisdictions enacted new death-penalty procedures similar to Georgia's.

The uninformed public also plays a significant role in the lack of authority in regards to transplantation of executed prisoners. This notion that the public knows very little about organ transplantation is further supported by the American Bar Associations 1992 enactment supporting efforts to education the public about "the critical need for organ...donations."⁵⁸

In "the post *Furman* era" the general public in 39 states demanded demonstrated vast support for the death penalty and demanded its reinstatement.⁵⁹ The death penalty is something the generally public can easily conceptualize as it takes away the life of someone who has taken another life in a cruel way.⁶⁰ On the other hand, taking organs from these prisoners to be transplanted is not second nature.⁶¹ Organ transplantation is new and unlike "a life for a life," there is no instinctive predisposition to take organs out of a corpse and put them in another person. Majority of the public does not even know this is a feasible option. However, if they knew that instead of just taking a life, this gives us the option to also give a life the public would demand that the statutes be modified.⁶²

⁵⁷ *Id.*

⁵⁸ PALMER, *supra* note 1, at 47.

⁵⁹ *Id.* at 48.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 48.

Justification for Removing Organs

The majority of the public has already agreed that it would be immoral to allow a capital murderer to take a life without proportional punishment.⁶³ By burying the transplantable organs of a capital murderer, we are allowing innocent people to die and taking organs from these executed prisoners is completely moral and justifiable.⁶⁴ The crimes committed by capital murders are so heinous that society has decided to remove them from existence.⁶⁵ We cannot bring back their victims but with advances in medicine we can increase and save the lives of thousands of citizens.⁶⁶ Also, removing organs from capital murderers also provides a stronger deterrent. Deterrence does not prevent all criminal activity, including capital murder, but it is sure to deter at least one, and if even one victim can be spared, the law is justifiable.⁶⁷

Capital punishment provides society with a tool to administer retributive justice on behalf of the victim's loved ones.⁶⁸ It would also be retributive to take the organs of executed prisoners for transplant because it is capable of channeling further the retributive rage and brings a more outlet positive purpose to the prisoners death beyond sheer vengeance.⁶⁹

The most compelling justification for removing organs from executed prisoners is restitution.⁷⁰ Restitution requires the offender to pay back monetary loss they have caused their victims. For capital murder, restitution cannot be used to give life back to a victim, but it can be

⁶³ PALMER, *supra* note 1, at 48.

⁶⁴ *Id.* at 50.

⁶⁵ *Id.* at 51.

⁶⁶ *Id.*

⁶⁷ PALMER, *supra* note 1, at 54.

⁶⁸ *Id.*

⁶⁹ *See Id.* at 54-57.

⁷⁰ *Id.*

brought about by restoring the life of others.⁷¹ The innocence of these victims whose lives were taken demands the restoration of life from the lives of their murders.⁷²

Ch. 4: Organ-Removal Statutes and the United States Constitution

Free Exercise Clause

The First Amendment's Free Exercise Clause prevents government interference with an individuals religious beliefs and practices.⁷³ Convicted capital murders will argue that taking their organs is a violation of this clause, claiming that their religion requires that they be buried with all of their organs.⁷⁴ However, it does not. Three inquiries are made when determining if a law violates the Free Exercise Clause; (1) neutrality of the law; (2) general applicability of the law, and (3) compelling government interest is served by enforcing the law.⁷⁵ If the first two inquiries are not satisfied, the law can still be justified by proving the third.⁷⁶

For the neutrality requirement, a law is not neutral if its intended purpose is to infringe upon or restrict certain practices because of their religious basis.⁷⁷ Death-sentence organ removal statutes may affect the religious beliefs of some capital murderers but it would be coincidental as these statutes are not created with the required intent of restricting religious beliefs, and therefore do not amount to a constitutional violation.⁷⁸

The general applicability requirement provides that a law that targets *only* conduct with religious motivation cannot advance a government interest; the law must have general

⁷¹ *Id.* at 58.

⁷² PALMER, *supra* note 1, at 60.

⁷³ *Id.* at 62.

⁷⁴ *Id.*

⁷⁵ PALMER, *supra* note 1, at 62.

⁷⁶ *Id.*

⁷⁷ *Id.* at 63.

⁷⁸ *Id.*

applicability.⁷⁹ Death-sentence organ removal statutes are applied to all capital murderers, regardless of religion. Therefore, these statutes do not violate the general applicability requirement.⁸⁰

The compelling government interest requirement only needs to be proved if courts determine that the law is not neutral or generally applicable.⁸¹ Assuming *arguendo* that the first two requirements were not met, these statutes would survive this test because they articulate the compelling government interest in making transplantable organs available to transplant patients and the law is narrowly tailored to address that interest because the statute directly adds to the nation's supply of transplantable organs.⁸²

Establishment Clause

The Establishment Clause of the First Amendment prohibits support for religion and empowering religious communities to have governmental authority.⁸³ Death-sentence organ removal statutes do not violate the Establishment Clause because it does not meet the criteria outlined by the Supreme Court.⁸⁴ In order to violate the Establishment Clause, the statute would have to (1) have no secular legislative purpose; (2) its primary effect would be to advance or inhibit religion, and (3) it would foster excessive government entanglement with religion, which they do not.⁸⁵

⁷⁹ *Id.* at 64.

⁸⁰ PALMER, *supra* note 1, at 64.

⁸¹ *Id.*

⁸² *See id.* at 65.

⁸³ PALMER, *supra* note 1, at 66.

⁸⁴ *Id.*

⁸⁵ *Id.*

The secular purpose behind death-sentence organ removal statutes is evidently to provide innocent people with life-saving organs and no purpose behind the statute is religious.⁸⁶ These statutes do not advance religion by promoting or benefitting any religion and they do not inhibit religion as they do not downsize the growth of religion as an institution or inhibit its growth.⁸⁷ Further, if the horrors of war have not obliterated human kind's faith in religion, these statutes certainly will not.⁸⁸ Lastly, the statutes have no excessive entanglement with religion, as they do not require the participation of religion.⁸⁹

Involuntary Servitude Clause and Slavery Clause

The Thirteenth Amendment states, “neither slavery nor involuntary servitude, except as punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States[.]”⁹⁰

Capital felons may argue that extracting their organs after death for use by other individuals constitutes involuntary servitude of their living organs.⁹¹ This argument has no merit because as the Supreme Court noted in *United States v. Kozminski*, the Constitution clearly states that involuntary servitude can be imposed as punishment for a crime.⁹² Also, the prerequisite for asserting this violation can only be done by a person, not organs.⁹³

The Slavery Clause of the Thirteenth Amendment does not apply because it is an absolute prohibition of slavery to protect people, not to protect the organs of executed capital felons.⁹⁴

⁸⁶ *Id.* at 66-67.

⁸⁷ *Id.* at 68.

⁸⁸ PALMER, *supra* note 1 at 68.

⁸⁹ *Id.* at 69.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ PALMER, *supra* note 1 at 70.

⁹⁴ *Id.*

Takings Clause

The Takings Clause of the Fifth Amendment prohibits the government from taking private property for public use without just compensation to the owner.⁹⁵ The Supreme Court has indicated that the Takings Clause was established to protect “pure” property.⁹⁶ Therefore, it cannot be applied to a corpse’s organs because they are quasi-property.⁹⁷ Assuming *arguendo* that corpses and their organs were pure property, the Supreme Court has recognized the common-law right by a governmental authority to require convicted criminals to forfeit their property as punishment.⁹⁸ Giving courts the power to sentence death is giving courts the power to “take” life so under the law a capital felon has no personal rights to life and the government does not have to compensate the felon for taking his life or his organs because he has no property interest in life.⁹⁹

Since it has been established in a majority of American jurisdictions that criminals who have committed capital murder do not have a right to life and must be executed, it would be illogical to argue that these prisoners do not have a right to life but have a right to have their transplantable organs. Therefore, the government has the power to taking of human organs as property and exercising dominion over them lawfully.

Seizure Clause

Capital felons will argue that taking their organs would violate the Seizure Clause of the Fourth Amendment by permitting the “unreasonable seizure” of their transplantable organs.¹⁰⁰

⁹⁵ *Id.*

⁹⁶ *Id.* at 71.

⁹⁷ *Id.* at 71.

⁹⁸ PALMER, *supra* note 1 at 71.

⁹⁹ *Id.* at 72.

¹⁰⁰ *Id.*

However, death-sentence organ removal statutes would not violate this clause because the government has legal custody or seizure of the capital felon upon arrest and after he has been sentenced to death, his life and organs belong to the government.¹⁰¹ Thereby, the government cannot unreasonably seize what is already in their possession.¹⁰²

Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment prohibits legislation treating one group of persons differently than others and that the challenged law is applied arbitrarily or discriminatorily.¹⁰³ Capital felons will argue that these statutes deny equal protection because they are not applied to other similarly situated murderers and that they are arbitrarily applied.¹⁰⁴

First, capital murderers and murders are not similarly situated. The maximum punishment for murder is life imprisonment and for capital murder it is death.¹⁰⁵ Capital-punishment jurisdictions recognize that the Constitution only allows the imposition of the death penalty for crimes that involve death but in order to constitute capital murder, there has to a variety of aggravating circumstances in addition to murder, which distinguishes capital murder from murder.¹⁰⁶

Second, the application of death-sentence organ removal statutes is not done so arbitrarily, as it would accompany the death penalty, and the Supreme Court has already

¹⁰¹ *Id.* at 73.

¹⁰² *Id.*

¹⁰³ PALMER, *supra* note 1 at 73.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 75-76.

determined that the arbitrary application of the death penalty does not violate the Equal Protection Clause.¹⁰⁷

Due Process Clause

The Fourteenth Amendment allows for a claim to be brought against any statute depriving citizens of life, liberty, or property.¹⁰⁸ Capital felons will argue that these statutes violate their rights to liberty and property, however it has already been demonstrated that the property allegations will fail under the Seizure and Takings Clauses.¹⁰⁹

The deprivation of liberty is also not offended because capital felons do not have a right to personal choice to dispose of their organs.¹¹⁰ Further, the Supreme Court has already determined that a law violating liberty interest can be validated if a legitimate government interest is being served, and that government interest is rationally related to the law.¹¹¹ Here, the government interest is increasing the nation's organ supply for transplant patients, and these statutes would directly increase the number of viable organs available for transplantation.¹¹²

Cruel and Unusual Punishment Clause

This Clause prohibits punishments that are “so severe as to degrade human dignity” which has been explained to mean a punishment that treats the members of the human race as

¹⁰⁷ *Id.* at 76.

¹⁰⁸ PALMER, *supra* note 1, at 77.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 79.

¹¹¹ *Id.*

¹¹² *Id.* at 80.

nonhumans and deprives them of recognition as a human being such as severe physical or mental pain.¹¹³

Death-sentence organ-removal statutes do not constitute cruel and unusual punishment because the method for execution under the statutes does cause any physical or mental pain during execution.¹¹⁴

This Clause also requires that the punishment be acceptable to society.¹¹⁵ As discussed earlier, the general public in capital punishment jurisdiction strongly favors the death penalty.¹¹⁶ The general public is also supportive of organ transplantation, so it can be reasonably inferred that the general public would support organ transplantation of organs harvested from capital felons.¹¹⁷

The Cruel and Unusual Punishment Clause requires that the punishment must not be excessive, excessive meaning unnecessary in that punishment “serves no penal purpose more effectively than a less severe punishment.”¹¹⁸ The Supreme Court has decided that death is an extreme, but constitutional punishment, and if the infliction of death is not excessive, taking organs from a corpse is not excessive.¹¹⁹ Also, this punishment does serve a penal purpose more effectively by causing the taker of life to give life.

¹¹³ PALMER, *supra* note 1 at 81-82.

¹¹⁴ *Id.* at 83.

¹¹⁵ *Id.* at 84.

¹¹⁶ *Id.*

¹¹⁷ *See id.* at 85.

¹¹⁸ PALMER, *supra* note 1, at 85.

¹¹⁹ *Id.* at 85-86.

Ch. 5: The Need for a New Method of Execution

Current Methods of Execution

There are five traditional methods for execution: firing squad, hanging, lethal injection, electrocution, and lethal gas.¹²⁰ “Execution option jurisdictions” have statutes that permit three types of execution options: (1) capital felon option; (2) federal option, and; (3) fallback option.¹²¹

Capital felon options allow the prisoner to choose his method of execution and depending on the jurisdiction they can choose between lethal injection-lethal gas, electrocution-lethal injection, hanging-lethal injection, and firing squad lethal injection.¹²²

The federal option provides that if the state in which the capital sentence was given was a capital-punishment jurisdiction that states method of execution will apply, but if the capital sentence was given in a non-capital-punishment jurisdiction, the capital felon will be transported to a jurisdiction that recognizes capital punishment and executed according to the receiving state’s laws.¹²³

A minority of states provide the fallback option, which allows for either a single or double alternative to their designated methods of execution, if that method is ever deemed unconstitutional.¹²⁴

¹²⁰ *Id.* at 87.

¹²¹ *Id.*

¹²² *Id.* at 88.

¹²³ PALMER, *supra* note 1 at 89.

¹²⁴ *Id.*

Inefficiency of Present Execution Methods

It has been said that firing squad executions are not clean, do not necessarily inflict a swift death, and the hood and target worn by the capital felon dehumanizes him.¹²⁵ Critics of hanging argue that it presents the risk of asphyxiation, which is slow and painful, if not done correctly and could rip off the prisoner's head.¹²⁶ Lethal injection, which is the leading method of execution, can cause pain by using a needle and may require surgery to implant the needle; the drugs often do not induce a quick and painless death; and the FDA has not approved the drugs for use as lethal injection.¹²⁷ Electrocutation causes several minutes of extreme pain and disfigures the capital murderer's corpse.¹²⁸ It has been argued that lethal gas causes excruciating pain and this method can take more than 10 minutes.¹²⁹ All of the aforementioned methods destroy transplantable organs and are therefore incompatible with death-sentence organ-removal statutes.

Utilizing an Efficient Method of Execution

One efficient method that does not destroy transplantable organs is "anesthesia-induced brain death" whereby a capital felon would be given an inject of sodium pentothal, then a sufficient dose anesthesia would be administered to cause brain-death, and while in this state, the transplantable organs could be removed.¹³⁰

¹²⁵ *Id.* at 109.

¹²⁶ *Id.* at 110.

¹²⁷ PALMER, *supra* note 1, at 110.

¹²⁸ *Id.*

¹²⁹ *Id.* at 111.

¹³⁰ *Id.*

Ch. 6: Other Necessary Changes in Capital Punishment Laws

It has been said that the poor are denied fairness under our current legal system and “the Supreme Court has unleashed a satanic wrath upon the poor.”¹³¹ Palmer purports that the promise of *Furman* to sanction arbitrary discrimination against the poor and if death-sentence organ-removal statutes were enacted, the poor would be the main source for transplantable organs.¹³²

As a nation we need to first identify the areas of capital punishment that must undergo legislative change so as to minimize discrimination against the poor, then isolate legislative areas that need to be altered in order to expedite the death penalty.¹³³

Minimizing Discrimination in Capital Punishment

Two areas in capital punishment that allow for discrimination of the poor are (1) prosecutorial discretion in charging capital murder and (2) jury discretion in sparing a capital murderer from the death sentence.¹³⁴

To this day the judiciary adheres to the common-law principle that a prosecutor has broad discretion regarding the disposition of criminal cases.¹³⁵ Traditionally, in criminal cases, once the prosecution has charged the defendant with a crime, the presiding judge decides the penalty and a prosecutor can only make recommendations regarding the penalty.¹³⁶ However, for capital-murder convictions, capital-punishment jurisdictions (except for New Jersey) permit the

¹³¹ *Id.* at 113.

¹³² PALMER, *supra* note 1, at 113.

¹³³ *Id.* at 114.

¹³⁴ PALMER, *supra* note 1, at 118.

¹³⁵ *Id.*

¹³⁶ *Id.*

prosecutor to waive the death penalty.¹³⁷ Palmer notes that in 1994, the only people awaiting execution on death row were the poor and we must place strict guidelines on prosecutors in order to avoid discrimination.¹³⁸

Our current system also gives the jury a wide range of discretion.¹³⁹ During the penalty phase in a majority of jurisdictions, the jury chooses whether or not to impose the death penalty and determine aggravating and mitigating circumstances in both non-weighting and weighting jurisdictions.¹⁴⁰ Weighting jurisdictions compare the totality of the mitigating against the totality of the aggravating circumstances in terms of their substantiality and not the amount of circumstances.¹⁴¹ In non-weighting jurisdictions the jury considers the sufficiency of the circumstances without weighing it.¹⁴² Some capital-punishment jurisdictions, called “death discretionary jurisdictions” allow the jury to arbitrarily refuse to impose the death penalty, even if the aggravating factors were favorable to the prosecution.¹⁴³

Expediting Capital Punishment

The majority of capital-punishment jurisdictions use a three-tier judicial system where there is a court of general jurisdiction, an intermediate appellate court, and a final appellate court.¹⁴⁴ Traditionally, all capital-punishment jurisdictions allowed convicted capital felons to file a direct appeal where they would allege conviction errors and sentencing errors together.¹⁴⁵

¹³⁷ *Id.* at 118.

¹³⁸ *Id.* at 120.

¹³⁹ PALMER, *supra* note 1, at 121.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 122-123.

¹⁴² *Id.* at 123.

¹⁴³ PALMER, *supra* note 1, at 124.

¹⁴⁴ *Id.* at 125.

¹⁴⁵ *Id.* at 126.

Today, most jurisdictions review the penalty phase of a death sentence conviction automatically without a valid waiver by the convicted capital felon.¹⁴⁶

The average time spent on death row for capital murderers is eight years. This is largely due in part to our appellate process and the impact of appellate stays.¹⁴⁷ After a capital felon receives the death sentence the court immediately orders a judicial stay, which precludes the execution until the court further exams allegations that the death penalty should not be enforced.¹⁴⁸ In jurisdictions with a three-tier system, if the intermediate appellate court is permitted to review the sentence and direct appeal followed by the final appellate court, there will be a stay imposed for both court examinations lasting one year to 18 months each.¹⁴⁹ If the capital felon decides to appeal to the Supreme Court and they grant a writ of certiorari, the stay is usually a year.¹⁵⁰ If the capital felon is denied relief they can petition for a writ for habeas corpus attacking the conviction and sentence which will start at the state level and work its way up again, which stays lasting at least a year for each court.¹⁵¹ If the Supreme Court denies relief on the state habeas corpus claim, they can seek relief under federal habeas corpus statutes, starting in the district courts up to the Supreme Court again with each stay lasting approximately a year.¹⁵² If the capital murderer is not provided relief through this avenue he will begin to file petitions and writs for mandamus, coram nobis, prohibition, and habeas corpus just in an effort to escape the death penalty.¹⁵³ This is known as the “great writ war” and the judicial stays that come along with it give these felons additional years of life.¹⁵⁴ Additionally, evidentiary issues

¹⁴⁶ *Id.*

¹⁴⁷ PALMER, *supra* note 1, at 127.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 127-28.

¹⁵¹ PALMER, *supra* note 1 at 128.

¹⁵² *Id.*

¹⁵³ *Id.* at 129.

¹⁵⁴ *Id.*

are appeal on direct appeal and constitutional issues are brought separately on by writs for habeas corpus, however if they were to be consolidated, this would also drastically reduce the amount of stays.¹⁵⁵

Conclusion

As a society, we have the capabilities to save the lives of our citizens. The need for transplantable organs increases every year and following a basic chain of supply and demand would suggest the need for a free market for organs, and there is no better way to obtain these organs than from people who are already dead and no longer have rights to life and liberty. The type of execution used would be more humane than current methods of execution and throwing away viable organs when we could easily use them to save lives are allowing people to die. We punish citizens for taking the lives of others but by not using these viable organs, in essence, we are doing the same thing. The statute proposed in this book would put an end to this.

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¹⁵⁵ *Id.*

Lords of Secrecy: The National Security Elite and America's Stealth Warfare

Reviewed By: Meghan Joyce ¹

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Relevant Legal and Academic Areas: Constitutional Law, Technology Law, Human Rights Law, Government, Warfare, Democracy, Decision-Making, Military Technologies

Summary: In the book "Lords of Secrecy: The National Security Elite and America's Stealth Warfare" author Scott Horton examines how America makes decisions regarding war and peace, in an effort to determine whether or not the institution of American democracy is in danger of being eliminated. Ultimately, Horton concludes that the decision-making paradigm, adopted in America starting with the advent of the Cold War, poses a significant threat to democracy. Horton blames this threat on the fact that national security decisions are increasingly being made without the consideration of the voting public. Rather, such decisions are being made solely by a handful of select advisors who select what information is disseminated to the public and which information remains classified. Horton dubs the individuals involved in this decision-making process the "Lords of Secrecy."

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(I.) Introduction

In the book *Lords of Secrecy: The National Security Elite and America's Stealth Warfare*, author Scott Horton sets out "to probe what democracy means in the context of making decisions about war and peace, as well as to examine how this idea was developed in America and how the American process has evolved over time."² Horton begins this examination by suggesting that one way to determine whether or not a country is truly democratic is by observing the way it makes national security decisions.³ For a genuine democracy to exist, Horton believes that citizens must be given access to information and a voice in deciding how such information is used and handled.⁴ Absent citizen involvement, the institution of democracy is threatened. This poses the question: do American's have a meaningful voice in national security decisions or are the "Lords of Secrecy" controlling the information gathering and decision making process and thereby eliminating the institution of American democracy?⁵

(II.) Summary of the Problem Generated by the "Lords of Secrecy"

Overtime, America has changed the way that it makes fundamental national security decisions: "[d]ecision-making authority has passed from the American people...and the Congress....to the president and his unelected and essentially unaccountable advisers in the national security arena."⁶ Horton defines the President and his select group of advisers as the

² SCOTT HORTON, *LORDS OF SECRECY: THE NATIONAL SECURITY ELITE AND AMERICA'S STEALTH WARFARE* 24 (Nation Books eds., 2015).

³ HORTON, *supra* note 2, at 18.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 19.

"Lords of Secrecy."⁷ Horton believes that through the use of classification powers, the "Lords of Secrecy" are managing and controlling the process through which information is disseminated to the public, essentially eliminating the voice of the citizenry in the decision making process.⁸

Horton believes that this increase in secrecy poses a threat to American democracy.⁹ He asserts, "when facts are declared secret, decisions that need to be made with knowledge of those facts are removed from the democratic process and transferred to the apex of the secrecy system, where only the "Lords of Secrecy" can influence them."¹⁰ Utilization of this decision making process leads to a situation where information that is traditionally considered public property becomes the property of an elite and secretive group.¹¹

Horton acknowledges that secrecy is used by all governments, especially when making military and diplomatic decisions."¹² However, Horton references statistics to show that secrecy is becoming an increasingly significant problem in the United States.¹³ Not only do statistics show that Americans know less about national security issues and the activity of the American military than ever before, but research has also shown that Americans are less aware of national security issues than citizens of other countries.¹⁴ So, what does this mean for the future of American democracy?

The fact that Americans no longer participate in conversations regarding what "their country does and what strategies and objectives it pursues" signifies that the American

⁷ *TopTenREVIEWS Releases Porn Industry Statistics*, TOPTENREVIEWS (Feb. 6, 2004), <http://www.toptenreviews.com/2-6-04.html>.

⁸ *Id.* at 17.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² HORTON, *supra* note 2, at 19.

¹³ *Id.*

¹⁴ *Id.*

Democracy is in trouble.¹⁵ The decision to go to war used to be "a question at the center of the nation's political discourse;" however, that is no longer the case.¹⁶ Starting after World War II, there was a significant change in the way that America made decisions regarding War and Peace.¹⁷ This transition was driven by the introduction of atomic weapons and the beginning of the cold war:

"America adapted by creating the national security state: permanent government structures addressing intelligence gathering, planning, and defense needs on a continuous basis during a time of quasi-peace. With the national security state came a new American elite: the national security expert and a vast bureaucratic apparatus. This apparatus in turn created an immense world of secrets: information so secret that only members of the national security elite have access to it. Secrecy is also used to justify disenfranchising citizens on national security issues: they can't have classified information and therefore they can't participate in critical decisions about war and peace; these matters are reserved for national security elites."¹⁸

Horton believes that continued adherence to this decision-making process significantly endangers the future of American democracy.¹⁹

(III.) Evolution of the Current National Security State

Over time the National Security State has evolved from an institution in which the concerns and opinions of the public were highly considered and regarded to an institution where information is intentionally withheld from the public so that they are secluded from decisions regarding America's national security. This evolution of decision-making power poses a great

¹⁵ HORTON, *supra* note 2, at 19.

¹⁶ *Id.* at 19-20.

¹⁷ *Id.* at 20.

¹⁸ *Id.* at 20.

¹⁹ *Id.* at 23.

threat to the institution of American democracy. The following analysis will explore the evolution of America's National Security State, from past to present.

A. Weber's Thesis on the "Degenerative Effects of Secrecy on Bureaucratic Institutions"

Max Weber, a German scholar who is regarded as a co-founder of sociology, developed a theory on the degenerative effects of secrecy on bureaucratic institutions.²⁰ Weber concluded that although bureaucracies sometimes used secrecy legitimately for military or diplomatic purposes, often institutions claim that a topic is secret to prevent disclosure of a mistake or criminal misconduct- "the sort of greed or draft that is common in defense contracting."²¹ Weber continued on to say that secrecy is a tactic favored by bureaucrats because it "puts them in a position of superior knowledge and information, lent an aura of greater authority to their analyses and recommendations, and protected them from criticism."²² Ultimately, claiming secrecy allows bureaucrats to keep information from the public and shields bureaucratic institutions from the public using such information to undermine the institutional authority of such organizations.²³ Although Weber conducted his analysis in the mid 1800's, his conclusions accurately represent today's national security state.

The main difference between when Weber conducted his examination of bureaucratic secrecy and today's national security state may be that, at the time of Weber's work, discussions of war and peace were still at the center of public discourse. Today, however, technological

²⁰ HORTON, *supra* note 2, at 52.

²¹ *Id.* at 55.

²² *Id.* at 55.

²³ *Id.* at 56.

advancements have worked to reduce the threat of American casualties in military operations; therefore, reducing the importance of military operations to most Americans. In Weber's day, although bureaucracies tried to claim secrecy, they were still held accountable for their decisions by the public. Today, the public's disinterest with national security has resulted in claims of secrecy, made by the National Security Elite, being accepted and unquestioned.

B. The 1997 Moynihan Commission Report on Protecting and Reducing Government Secrecy

In 1997 academic Daniel Patrick Moynihan was commissioned to chair the Commission on Protecting and Reducing Government Secrecy, created by a 1994 act of Congress.²⁴ The Commission's report remains the "single most authoritative government assessment of its own secrecy practices."²⁵ The report highlighted four main findings: (1) secrecy is a form of government regulation; (2) secrecy keeps information away from decision makers; (3) secrecy thwarts accountability; and (4) secrecy undermines democracy.²⁶

1. Secrecy as a Form of Government Regulation

The first finding made by the Moynihan Commission was that secrecy is used as a form of government regulation.²⁷ Typically, when the government issues regulations, they are required to hold hearings, circulate drafts for feedback, and publish proposed regulations.²⁸ This institutional system allows for the public to weigh in in the process of drafting and instituting

²⁴ HORTON, *supra* note 2, at 73.

²⁵ *Id.* at 73.

²⁶ *See id.* (R1.2)(a).

²⁷ *See id.* (R1.2)(a).

²⁸ *See id.* at 73-74. (R3.2)

regulations.²⁹ However, this "core aspect of democratic governance" is missing from the development of regulations governing security classifications.

Additionally, the Commission found that secrecy is used as a form of government regulation through use of security clearances.³⁰ The government has the authority to demand that individuals possess a certain level of security clearance to access certain information and be employed by certain organizations.³¹ Because lay citizens are not privy to such information, the use of security clearances allows governmental agencies to skirt traditional hiring and firing practices.³² Ultimately, secrecy works to provide the government with a way to limit the information that is disseminated to the public and a means of "disciplining employees that is free from [public] review and oversight."³³

2. Secrecy Keeps Information Away from Decision Makers

The second finding made by the Moynihan Commission is that secrecy effectively keeps information away from decision makers.³⁴ Classification of information effectively limits the amount of information that is available to the public, lawmakers, and even the executive.³⁵ This means that information is consciously withheld from the voting public, denying them the opportunity to weigh this information in making critical voting decisions.³⁶ The Moynihan Documents reference numerous instances where "critically important intelligence was withheld from the government decision maker who most needed to know it."³⁷

²⁹ HORTON, *supra* note 2, at 73-74. (R15 & 3.2)

³⁰ HORTON, *supra* note 2, at 73.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ HORTON, *supra* note 2, at 74.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

3. Secrecy Thwarts Accountability

The third finding made by the Moynihan Commission is that secrecy thwarts accountability.³⁸ Accountability is a hallmark of American democracy. The idea is that the democratic system holds officials accountable when they "abuse their authority, make mistakes, or commit crimes."³⁹ The Moynihan Commission concluded that individuals involved in serious acts of official misconduct used security classifications to shield their behavior from public oversight and criminal investigation.⁴⁰ This resulted in the behavior of many government officials escaping punishment for their wrongdoings.⁴¹

4. Secrecy Undermines Democracy

The final finding made by the Moynihan Commission is that secrecy undermines democracy.⁴² The Commission found that the most significant problem associated with secrecy was that secrecy has a highly coercive effect on American democracy.⁴³ Traditionally, American's made decisions after an issues was heavily debated and alternate view points were discussed and deliberated.⁴⁴ However, the arrival of the "atomic age and the regime of secrecy" caused this process to be undermined.⁴⁵ The National Security Elite began to withhold information from the publics knowledge and effectively remove their voice and opinions from the decision making process. This is a trend that has continued from the time of the Cold War through the present day.

³⁸ *Id.* at 122-23.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ HORTON, *supra* note 2, at 75.

⁴² HORTON, *supra* note 2, at 76.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

C. Modern National Security State

Many thought that the end of the Cold War would coincide with an end to the age of secrecy.⁴⁶ However, this did not prove to be true. At the close of the Cold War, "[a] conscious decision was taken to reduce the size of the officer corps, the intelligence sector struggled to maintain its budget, and the Moynihan Commission recommended sweeping reforms and a sharp reduction in the scope of secrecy."⁴⁷ Additionally, President Clinton issued Executive Order 12958, which tightened classification requirements, loosened declassification requirements and established a regulation mandating that all classified documents become declassified after 25 years unless significant steps are taken to maintain classification.⁴⁸ Unfortunately the implementation of these policies was unsuccessful in ending the age of secrecy.⁴⁹ Rather, in the wake of the 1996 reforms, the document classification rate continued to steadily increase and the "Lords of Secrecy" continued to withhold information from the public.⁵⁰

After the September 11th Terrorist Attacks, the classification process steadily increased once again.⁵¹ "In the year following September 11 attacks, the government classified 11.3 million documents, which jumped to 14. 2 million the following year, and 15.6 million the year thereafter."⁵² Today, the National Security State is marked by more government secrets than ever before.⁵³ This signals that the voting public is far removed from the national security decision-

⁴⁶ HORTON, *supra* note 2, at 80.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ HORTON, *supra* note 2, at 80.

⁵² HORTON, *supra* note 2, at 81.

⁵³ *Id.*

making process, a condition that severely threatens the continued existence of American Democracy.

(IV.) Impact of War-Making Technologies on the National Security State

Technological advancements in the field of military weaponry have contributed to this fundamental shift in decision-making power toward secrecy.⁵⁴ "The 'Lords of Secrecy' have chosen a favorite weapon that helps identify them and define their power. It is the Predator drone. The armed drone has one attribute above all others that endears it to the national security elites: it is a consummately secret weapon."⁵⁵ Since the predator drone is largely perceived as a zero-casualty technology, it allows the "Lords of Secrecy" to conduct large scale, secret military operations without endangering Americans.⁵⁶ Secret use of this weapon has threatened the institution of American democracy in three significant ways: (1) use of the predator drone has caused the public to become disinterested in law and policy governing the use of such military technologies⁵⁷; (2) use of predator drones has caused non-combatants to be devalued in making military decisions⁵⁸; (3) the use of predator drones has the potential to contribute to the execution of continual or wider wars.⁵⁹

First, the predator drone has caused the public to become disinterested in law and policy governing the use of similar military technologies.⁶⁰ Because the danger posed to American lives

⁵⁴ *Id.* at 109.

⁵⁵ *Id.* at 111.

⁵⁶ *Id.* at 110.

⁵⁷ HORTON, *supra* note 2, at 111.

⁵⁸ *Id.* at 113.

⁵⁹ HORTON, *supra* note 2, at 112.

⁶⁰ *Id.* at 111.

through use of the predator drone is negligible, it falls into the category of war technologies that the public is uninterested in.⁶¹ Public disinterest in the predator drone allows for the national security elite to use this technology without being publically held accountable for their actions.⁶² Horton suggests that public apathy towards such military technologies has the potential to lead to laws governing the use of such technologies being passed with less scrutiny and oversight by the American citizenry.⁶³ Ultimately, this leads to a situation where the American citizenry unintentionally abdicates their decision making power to the "Lords of Secrecy" without fully understanding how their actions pose a significant threat to the institution of American democracy. In order to maintain democracy, it is imperative that American's take a greater interest in developing and instituting the policies governing war-making technologies.

Second, Horton suggests that the use of drones may cause a devaluation of non-combatants in making tactical decisions.⁶⁴ This means that the "Lords of Secrecy" likely will not consider the danger that predator drone activity poses to civilians in close proximity to legitimate military targets when planning and executing operations.⁶⁵ Rather, the injury and/or death of these individuals will merely be considered collateral damage, as long as two conditions are met: (1) a reasonable relationship exists between the damage done by the predator drone and the nature of the attack; and (2) the attacking party executes the operation in a manner that inflicts the least amount of damage while still accomplishing a legitimate military objective.⁶⁶ Although predator drones are typically precise, it is impossible to gage the exact amount of collateral damage originating from an attack. Therefore, it is necessary for American citizens to consider

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ HORTON, *supra* note 2, at 112.

⁶⁵ *Id.* at 113.

⁶⁶ HORTON, *supra* note 2, at 113.

whether they are accepting of the theory of collateral damage; if not, it is imperative that the public petitions the government to re-insert the voice of the American citizenry in national security decisions.

Third, a study conducted by the Stimson Center on the evolution of drone warfare concluded that the use of predator drones by the "Lords of Secrecy" may lead to the execution of continual or wider wars.⁶⁷ The study concluded:

"[t]he increasing use of lethal [drones] may create a slippery slope leading to continual or wider wars. The seemingly low-risk and low-cost missions enabled by [drone] technologies may encourage the United States to fly such missions more often, pursuing targets with [drones] that would be deemed not worth pursuing if manned aircraft or special operation forces had to be put at risk...[Drones] also create an escalation risk insofar as they may lower the bar to enter a conflict, without increasing the likelihood of a satisfactory outcome."⁶⁸

It is entirely probable that Americans are unaware that predator drones pose this potential. Therefore, it is essential for the people to become informed of the consequences that emerge when they abdicate their seat at the nation's decision-making table. In order to avoid the institution of American democracy from being eliminated, the American people must show an interest in crafting legislation governing war-making technologies and demand to have a voice in all decisions made by the government regarding war and peace.

⁶⁷ *Id.* at 111-112.

⁶⁸ *Id.* at 112.

(V.) Three Steps taken by the "Lords of Secrecy" to Mitigate Public Backlash against the Change in Decision-Making Power

The National Security Elite took three significant steps to ensure that the public would not oppose the change in the American decision-making paradigm: (1) reconfiguration of forces deployed to combat environments; (2) creation of a volunteer military; and (3) transition to use of robotic weapons.⁶⁹ The theory was that if American's were more satisfied with the operation of the U.S. military and less concerned that U.S. troops would be injured in combat, they would not be as invested in decisions made by the "Lords of Secrecy" regarding the nation's safety and security.⁷⁰ Horton fears that the population's decreased interest in questions of going to war is going to lead to the executive having "broad latitude to engage in military campaigns."⁷¹

A. Reconfiguration of Forces Deployed to Combat Environments

The first way that the national security elite attempted to mitigate the backlash caused by the change in America's decision-making strategy is through the reconfiguration of forces deployed to combat settings.⁷² "National security elites assume that the American public is less concerned about the death or dismemberment of a contractor than of a service man or – woman."⁷³ This realization encouraged the elite to hire private security contractors with the "ability to deploy quickly into hostile areas, use lethal force aggressively" rather than deploying American troops to carry out similar operations.⁷⁴

⁶⁹ HORTON, *supra* note 2, at 23.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 22.

⁷⁴ HORTON, *supra* note 2, at 22.

The notion of military contractors began with the Revolutionary War: boat-making professionals helped General Washington shuttle his troops across the Delaware River.⁷⁵ For years after, the concept of military contractors steadily increased. "By the time of the Afghanistan War...the number of civilian contractors deployed actually came to exceed the number of uniformed service personnel."⁷⁶ This structure was effective for a variety of reasons: (1) private security contracts have the ability to engage in combat without being limited by the rules and regulations that the U.S. military is trained to respect; (2) private security contractors have the ability to engage in combat operations in complete secrecy; (3) private security contractors have the ability to avoid congressional oversight "by claiming business confidences"; and (4) private security contractors can conduct operations without facing the political consequences derived from sending American soldiers to war.⁷⁷ Ultimately, "[p]rivate security contractors can fill a gap that opens when a democratic government wants to deploy forces to some dangerous corner of the world but does not want to face questions from its population motivated by concern for the safety and well-being of young men in its armed forces."⁷⁸ Using public service contractors has been an effective strategy in mitigating the backlash caused by the change in the American decision-making paradigm.⁷⁹

B. Creation of a Volunteer Military

The second way that the national security elite attempted to mitigate the backlash caused by the change in America's decision-making strategy is by replacing the traditional military draft

⁷⁵ HORTON, *supra* note 2, at 21.

⁷⁶ *Id.* at 22.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

with a volunteer army.⁸⁰ Many citizens were aggravated by the idea that the draft forced men to serve in the American military without their consent and threatened criminal prosecution if they refused to serve.⁸¹ "Eliminating the draft removed much of the anger that powered opposition to military campaigns waged abroad; it deflated public interest in national security issues generally."⁸²

C. Transition to Use of Robotic Weapons

The third way that the national security elite attempted to mitigate the backlash caused by the change in America's decision-making strategy is by transitioning from conventional military tactics to the use of robotic weapons.⁸³ Research indicates that Americans are least interested in hostilities when there is less risk of physical harm to Americans.⁸⁴ The national security elite capitalized on this conclusion and invested in low casualty military technologies, experts began to explore the concept of "air war, the development of tactical missile technologies like cruise missiles and smart bombs, and robotic weapons systems such as drones."⁸⁵ The reasoning was that, since these techniques do not involve a great risk of physical harm, the decision to employ such weapons could be made unilaterally, without consultation with Congress or the American public.⁸⁶

⁸⁰ HORTON, *supra* note 2, at 21.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ HORTON, *supra* note 2, at 21.

⁸⁵ *Id.*

⁸⁶ *Id.*

(VI.) Conclusion

Is the American decision-making paradigm consistent with the notions of democracy that America was founded upon?⁸⁷ Horton thinks not.⁸⁸ He worries that the "cache of secrets [being kept from the American public by the national security elite]... is growing into a modern Tower of Babel, already essentially unmanageable and overshadowing all the institutions of American democracy."⁸⁹

So, how do we transition out of this period of decision-making by the national security elite? The Brennan Center for Justice at New York University Law School has crafted six policy proposals to "change the dynamics surrounding treatment of secrecy in a bureaucratic context": (1) prepare electronic forms to guide individuals as they make classification decisions. These forms would include sections in which the classifier would explain the rationale for the decision and disclose their identity; (2) require the inspectors general of major agencies to complete spot audits of classification decisions to identify individuals who repeatedly abuse the classification power; (3) sanction individuals who repeatedly abuse the classification power. These sanctions would "start with remedial training and [end] with disciplinary action"; (4) mandate that national security agencies spend at least 8% of their budget on classification training for employees; (5) allow protections to be issued to individuals who do not classify information received from others; and (6) encourage holders of classified information to alter their classification decisions, without having their identity revealed, by issuing them a small cash reward.⁹⁰ Horton believes that Washington should consider some if not all of these policy proposals in order to ensure that

⁸⁷ HORTON, *supra* note 2, at 195.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 194.

the national security elite does not maintain control over the nation's decision-making, and effectively eliminate democracy in the process.⁹¹

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⁹¹ HORTON, *supra* note 2, at 194-195.